

1930 SUPPLEMENT
TO
THE GEORGIA CODE

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1930 SUPPLEMENT
TO
THE GEORGIA CODE

BEING A SUPPLEMENT
TO
PARK'S ANNOTATED CODE OF GEORGIA
AND
MICHIE'S 1926 GEORGIA CODE

Embracing Amendments and Additions made by the General Assembly at the
Extraordinary Session of 1926, and the Regular Sessions of 1927
and 1929. Together with Annotations from Judicial Deci-
sions contained in Volumes 161-168 Ga. Reports,
Volumes 34-39 Ga. Appeals, and
Fed.(2d) 1-33 inclusive

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Preface

This volume supersedes volume 14 of Park's annotated Code of Georgia and the 1928 Supplement to Michie's Code of 1926. It includes all the general laws enacted during the 1927 and 1929 sessions of the Georgia Legislature, with complete annotations. It also includes the statutes enacted at the extraordinary session of 1926 and the amended rules of court. A general index, index of local laws and table of statutes complete the treatise.

The owner of either the first thirteen volumes of Park's Annotated Code or Michie's Code of 1926 will find that this work completely supplements his original Code. Where the Michie and Park's classification of statutes differed, the Park's section line has been inserted with reference to the corresponding section in this volume.

Every effort has been made to maintain the high reputation as law publishers enjoyed individually by The Harrison Company of Atlanta and The Michie Company of Charlottesville, Va. In this, their first joint publication, it is believed that the profession will receive the full benefit of their combined experience and skill.

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CODE OF GEORGIA--SUPPLEMENT

PRELIMINARY PROVISIONS

§ 4 (§ 4.) Construction of statutes.

See notes to section 3092.

Construction of By-Law.—Pursuant to paragraph 1 of this section it is held that the words "Nominations from the floor shall always be in order," in a by-law are to be given their ordinary signification; and the plain and obvious meaning of the language employed is that nominations from the floor are always in order until an election has in fact been held. *Hornady v. Goodman*, 167 Ga. 555, 146 S. E. 173.

Not a Question for Jury.—It should not be left to the jury to determine whether a party could or could not substantially comply with the code or amendatory laws. *Lime-Cola Bottling Co. v. Atlanta, etc., R. Co.*, 34 Ga. App. 103, 128 S. E. 226.

Reasonable Care Insufficient.—Where a substantial compliance with a statute by a railway company would be sufficient, the duty of compliance to that extent would be absolute, and the company would not have discharged the duty merely by the exercise of reasonable care to that end. *Lime-Cola Bottling Co. v. Atlanta, etc., R. Co.*, 34 Ga. App. 103, 128 S. E. 226.

When Last Day Falls on Sunday—Bill of Exceptions.—When the last day numerically for presenting the bill of exceptions for certification falls on Sunday, the presentation of the bill of exceptions to the trial judge for certification upon the next day, Monday, is not too late. *Maryland Casualty Co. v. England*, 34 Ga. App. 354, 129 S. E. 446.

Service of Process.—The giving of "five days notice of the time and place of hearing," required by section 5154, of a petition for discharge filed by a defendant in a suit in trover, who is held in imprisonment in default of bail, is not complied with by serving the plaintiff, on the first day of May, with notice that the time of hearing the petition will be on the fifth day of May following. From the first day of May to the fifth day of May is only four days. *Hardin v. Mutual Clothing Co.*, 34 Ga. App. 466, 129 S. E. 907.

Cited in *Columbus v. Muscogee Mfg. Co.*, 165 Ga. 259, 140 S. E. 860; *Citizens & Southern Bank v. Taggart*, 164

Ga. 351, 354, 138 S. E. 898; *Mobley v. Chamblee*, 39 Ga. App. 645, 148 S. E. 306; *Export Ins. Co. v. Womack*, — Ga. —, 142 S. E. 851.

Applied in suits brought by administrators in *Allen v. Allen*, 39 Ga. App. 624, 147 S. E. 798; *Willcox v. Beechwood Band Mill Co.*, 166 Ga. 367, 370, 143 S. E. 405.

§ 10 (§ 10.) Waiver of law.

See notes to §§ 3154(19), 3154(55).

Failure to Object to Motion for New Trial.—Any point of practice which, if sound, would be fatal to a motion for a new trial should be presented to the trial court by a motion to dismiss the application for a new trial, and, if not so presented, will be considered as having been waived. *Walker v. Neil*, 117 Ga. 733, 45 S. E. 387; *Hopkins v. Jackson*, 147 Ga. 821, 822, 95 S. E. 675; *Fairburn v. Brantley*, 161 Ga. 199, 130 S. E. 67.

Waiving Process.—A person is entitled to legal service, but may waive service of the original suit by appearing and pleading to the merits. Failure to serve a motion for new trial will afford ground upon which the motion must be dismissed, but the failure may be waived. *Fairburn v. Brantley*, 161 Ga. 199, 130 S. E. 67.

§ 13 (§ 13.) Bonds taken by officers.

Failing as Statutory Bond—Good as Common Law Bond.—Where a bond was made payable to the levying officer and was conditioned to deliver the property at the time and place of sale but no affidavit of illegality was ever filed or attempted to be filed, the bond taken is a good and valid obligation as a common-law bond and recovery on it can be had. *Mulks v. Kennedy*, 143 Ga. 618, 85 S. E. 845, cited and approved. *Garmany v. Loach*, 34 Ga. App. 722, 724, 131 S. E. 108.

Cited in *Fidelity, etc., Co. v. Norwood*, 38 Ga. App. 534, 540, 144 S. E. 387.

THE POLITICAL CODE

FIRST TITLE

Divisions; of the Boundary, Sovereignty and Jurisdiction of the State

CHAPTER 3

Jurisdiction Ceded to the United States Over Certain Land

§ 26(a). Park's Code.

See § 26(1).

§ 26(1). Land for other public buildings.—The consent of the State of Georgia is hereby given in accordance with the 17th clause, 8th section, and of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, any land in this State which has been or may hereafter be acquired for custom-houses, post offices, arsenals, other public buildings what-

ever, or for any other government purposes. Acts 1927, p. 352.

§§ 26(b), 26(e). Park's Code.

See § 26(2).

§ 26(2). Same—Jurisdiction; exemption from taxation.—The exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except that the state retains the right to serve thereon all civil and criminal processes issued under authority of the state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

The jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county, and municipal taxation, assess-

ment, or other charges which may be levied or imposed under authority of the state.

SECOND TITLE

Elections by the People

CHAPTER 1

Qualification of Voters

§ 34 (§ 32.) Qualification of voters.

Failure to Make Return of Taxes.—The failure of a tax payer to make a return of his taxes as required by law is not, without more, a ground for disqualifying him as a voter for members of the General Assembly. As to taxes, it is only non-payment which will disqualify the voter, and even then the exception in paragraph 3 must be considered. *Daniel v. Claxton*, 35 Ga. App. 107, 132 S. E. 411.

CHAPTER 2

Registration of Voters

ARTICLE 2.

Method of Registering on Voters' Book

§ 42 (§ 42.) Oath to be read or repeated at request of applicant.

Signature Required.—One can not lawfully register as a voter without signing his name in the voters' book in person or by making his mark as prescribed by this section. *Turk v. Royal*, 34 Ga. App. 717, 131 S. E. 119.

ARTICLE 5

List of Registered Voters, Who Entitled to Vote

§ 61. Additional registration list.

See § 1551(133).

ARTICLE 8

Ballots, by Whom and Where Cast

§ 71. Voter changing residence.

Must Apply to Registrars.—One who had moved from another county to that wherein an election was held, and, by application to the tax-collector of the latter county, had had his name transferred and entered upon the voters' book of that county, but at no time had made any application to the registrars thereof for such transfer, and had offered no proof before them as to his qualifications to vote, was not qualified to vote in such bond election. *Turk v. Royal*, 34 Ga. App. 717, 131 S. E. 119.

CHAPTER 3

Elections for Members of the General Assembly

ARTICLE 1

Managers of Election; Qualifications and Oath

§ 76. Superintendent of elections for members of the legislature.

See section 1551(133).

ARTICLE 2

Election Precincts

§ 79. Election Precincts.

See notes to section 1551(133).

ARTICLE 3

Elections; When and How Held

§ 80(b). In certain counties.—In all counties in the State of Georgia, having, by the United States census of 1920 or any future census, a population of not less than 14,501 and not more than 14,505 inhabitants, all election precincts which are located as a whole or in part in an incorporated city or town having a population of 1,000 or more according to the 1920 census of the United States, shall remain open on all election days, whether general, special, primary or otherwise, from 7:00 o'clock a. m. to 6:00 o'clock p. m.; provided however, that the provisions of this section shall not apply to elections that are held by the municipal authorities or the local board of education. Acts 1927, p. 130.

§ 82 (§ 72.) Manner of conducting elections.

Superintendents Cannot Recount Ballots.—Under the provisions of this paragraph, superintendents of election have neither power nor authority to examine or recount ballots cast in a county election for the purpose of correcting errors, whether the same be due to mistake or fraud as prescribed by this and the next paragraph of the section. *Bacon v. Black*, 162 Ga. 222, 133 S. E. 251.

Paragraph 9—Certificate Necessary to Complete Consolidation.—The formal and completed consolidation of the vote consists in the ascertainment from the face of the returns of the vote cast for the respective counties and a declaration of the result, and after that the issuance of the certificate prescribed in paragraph 9 of this section. *Beasley v. Bacon*, 164 Ga. 557, 558, 139 S. E. 55.

ARTICLE 4

Penalty for Managers' Default

§ 84 (§ 74.) In case superintendents make false return, etc.

Superintendent also Liable under Penal Code.—If the num-

ber of votes is knowingly and falsely misstated by a superintendent of an election, he has failed to discharge a duty imposed upon him by law, and he is liable to be prosecuted, under section 658 of the Penal Code, for a misdemeanor although this section also applies. *Black v. State*, 36 Ga. App. 286, 136 S. E. 334.

CHAPTER 7

Contested Elections

ARTICLE 1

In Cases Where Governor Commissions

§ 121. Proceedings in contested election.

Who May Contest.—Where it does not appear that the petitioners were candidates for the offices to which the defendants were elected are not in a position to contest the election. *Jones v. McElreath*, 167 Ga. 833, 834, 146 S. E. 734.

ARTICLE 3

Other Contested Elections

§ 125 (§ 111.) Contests in other elections.

Jurisdiction of Ordinary—Mandamus to Compel Hearing.—Where on the hearing of a contested election case before an ordinary, the contestee filed a demurrer to the petition, which demurrer was sustained and the ordinary dismissed the contest proceedings, and the contestant filed a petition against the ordinary for a writ of mandamus to compel the ordinary to hear and determine such election contest, alleging that the ordinary had failed and refused to perform his legal duty in the premises; the court did not err, in granting an order making the mandamus absolute, and requiring the ordinary to hear and determine such contest. *Morgan v. Wason*, 162 Ga. 360, 133 S. E. 921.

Does Apply to Elections in Disposition of Public Utility Properties.—This section relates to contests of elections for public officers of the several kinds especially enumerated, and does not purport to authorize a contest before the ordinary of an election of the character provided for in §§ 904(1)-904(4). *Byrd v. City of Alma*, 166 Ga. 510, 143 S. E. 767. See notes to § 904(1).

The declaration by the city council of the result of an election for mayor of the City of D, under its charter, is not final and conclusive, and does not prevent the defeated candidate from contesting the election of a rival candidate under this section. *Moore v. Dugas*, 166 Ga. 493, 143 S. E. 591, citing *Low v. Towns*, 8 Ga. 360; *McCants v. Layfield*, 149 Ga. 231, 99 S. E. 877; *Bennett v. Public Service Commission*, 160 Ga. 189, 127 S. E. 612. Cited in *Avery v. Hale*, 167 Ga. 252, 145 S. E. 76.

ARTICLE 4

Elections Not Set Aside for Formal Defects, When

§ 126 (§ 112.) Election not void by reason of formal defects.

Violation of Directory Provision Harmless.—An election was not invalid because it did not appear that the mayor and council had published the names of the election managers in accordance with a certain provision of the city

charter, for this provision is directory. *Edwards v. Clarkesville*, 35 Ga. App. 306, 133 S. E. 45.

Ballots Improperly Marked.—That the notice to the voters provided that the ballots should have written or printed thereon the words “for school bonds” or “against school bonds,” and that such ballots may have been used, did not invalidate the election, notwithstanding the ordinance calling the election prescribed that the ballots should bear the words “for public school bonds for schoolhouse” or “against public school bonds for schoolhouse.” *Edwards v. Clarkesville*, 35 Ga. App. 306, 133 S. E. 45. For similar holding as to vote for local taxation in school district, see notes to § 1551(133) of the Georgia Code of 1926.

Specifying “Australian Ballot System.”—Even in the absence of all provisions therefor, to say merely that the election was to be held or was held under some system indefinitely described as the “Australian ballot system” would not affirmatively disclose that the election was void. *Edwards v. Clarkesville*, 35 Ga. App. 306, 312, 133 S. E. 45.

ARTICLE 5

Primary Elections in Certain Counties

§ 126(1). Primary election contests in counties of 6,458 to 6,462 population.—The procedure relative to contests as outlined in subsections or paragraphs numbers two, three, four, five, and seven of section 121, also sections 122 and 123 of Park's Code of Georgia, shall be and the same is hereby made the procedure to contest the nomination of any person nominated in any primary election by the people for election to any county office in such counties of this State as have a population of not less than 6,458 and not more than 6,462, as determined by the census of the United States of 1920. Acts 1929, p. 226, § 1.

Oath of Candidate before De Facto Notary.—The fact that the statement of one of the candidates was sworn to before a de facto notary public, both the notary and the candidate thinking that the notary was a de jure officer and both acting in good faith did not render invalid the statement of such candidate. *Adair v. McElreath*, 167 Ga. 294, 295, 145 S. E. 841.

§ 126(2). Candidate receiving highest vote is deemed nominee.—The candidate receiving the highest number of votes as shown by the consolidation of the returns of said primary election shall be deemed the nominee for election to the office as he may have been candidate therefor, and it shall not be necessary for any authority to so declare him as such, as a condition precedent to contesting his nomination for election to such office. Acts 1929, p. 226, § 2.

§ 126(3). Judgment of superior court final.—The judgment, order, or finding of the judge of the superior court of such counties, declaring the nominee in any such contests, shall be final. Acts 1929, p. 227, § 3.

CHAPTER 8

Primary Elections

§ 138(g-1). Park's Code.

See § 138(7½).

§ 138(7½). Nominations for General Assembly members and Superior Court Judges in certain counties; specification of incumbent opposed; plurality.—Candidates for the General Assembly in all counties having within its borders a city or a part of a city of population of 200,000 or more and candidates for Judges of the Superior Court in all judicial circuits having a county or counties of population of 200,000 or more, according to the last or any future census of the United States, shall, when qualifying for a primary, specify the particular incumbent which said candidate desires to oppose or succeed, and all ballots shall be prepared accordingly. The candidate receiving a plurality of the votes cast for candidates for such office shall be declared the nominee therefor. Acts 1925, p. 205; 1927, p. 246.

Editor's Note.—The amendment of 1927 limited the provision as to candidates for the General Assembly, to counties "having within their borders a city or a part of a city."

§ 138(7½a). Candidate required to specify incumbent opposed, in counties of 25,397 to 25,700 population.—Candidates for the General Assembly in all counties having more than one representative, and having a population of not less than 25,393 and not more than 25,700 according to the last census of the United States, shall, when qualifying for a primary, specify the particular incumbent which said candidate desires to oppose or succeed, and all ballots shall be prepared accordingly. The candidate receiving a plurality of the votes cast for candidates for such office shall be declared the nominee therefor. Acts 1929, p. 227, § 1.

CHAPTER 11

Voting Machines in Counties between 63,690 and 63,692 Population

§ 138(24). Definitions.—The list of candidates used or to be used on the front of the voting machine for an election district in which a voting machine is used pursuant to law shall be deemed official ballots under this chapter. The word "ballot" as used in this article (except when reference is made to irregular ballots) means that portion of the cardboard or paper or other material within the ballot frames containing the name of the candidate and the designation of the party by which he was nominated, or a statement of a proposed constitutional amendment, or other question or proposition with the word "yes" for voting for any question or proposition, and the word "no" for voting against any question. The term "question" shall mean any constitutional amendment, proposition, or other question submitted to the voters at any election. The term "official ballot" shall mean the printed strips of cardboard containing the names of the candidates nominated and a statement of the question submitted. The term "irregular ballot" shall mean a vote cast, by or on a special device, for a person whose name does not appear on the ballots. The term "voting machine custodian" shall mean the person who

shall have charge of preparing and arranging the voting machine for elections. The term "protective counter" shall mean a separate counter built into the voting machines which cannot be reset, which records the total number of movements of the operating lever. Acts 1929, p. 337, § 1.

Editor's Note.—The title of this act [§§ 138(24)-138(53)] reads: "An Act to authorize the county commissioners of any county in the State of Georgia of a population of not less than 63,690 or more than 63,692 according to the State census of 1920, to adopt" voting machines, etc., but nowhere in the Act is the limitation as to population mentioned.

§ 138(25). Requirements of voting machines.—Any voting machines may be adopted, rented, purchased or used which shall be so constructed to fulfill the following requirements: It shall secure to the voter secrecy in the act of voting; it shall provide facilities for voting for or against as many questions as may be submitted; it shall permit the voter to vote for the candidates of one or more parties; it shall permit the voter to vote for as many persons for an office as he is lawfully entitled to vote for, but no more; it shall prevent the voter from voting for the same persons more than once for the same office; it shall permit the voter to vote for or against any question he may have the right to vote upon, but no other; if used in primary elections, it shall be so equipped that the election officials can lock out all rows except those of the voter's party by a single adjustment on the outside of the machine; it shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions; it shall be provided with a "protective counter" or "protective device" whereby any operation of the machine before or after the election will be detected; it shall be provided with a counter which shall show at all times during an election how many persons have voted; it shall be provided with a mechanical model, illustrating the manner of voting on the machine, suitable for the instruction of voters; it may also be provided with one device for each party, for voting for all the presidential electors of that party by one operation; and a ballot therefor containing only the words "Presidential Electors For" preceded by the name of that party and followed by the names of the candidates thereof for the offices of president and vice-president, and a registering device therefor which shall register the vote cast for said electors when thus voted collectively, provided, however, that means shall be furnished whereby the voter can cast a vote in part for the candidates for presidential electors of one party, and in part for those of one or more other parties or in part or in whole for persons not nominated by any party. Every voting machine shall be furnished with a lantern, or a proper substitute for one, which shall give sufficient light to enable voters while voting to read the ballots and suitable for use by the election officers in examining the counters. All voting machines used in any election shall be provided with a screen, hood or curtain which shall be so made and adjusted as to conceal the voter and his action while voting. Acts 1929, p. 338, § 2.

§ 138(26). Adoption of voting machine.—The board of county commissioners of such counties may adopt for use at elections any kind of voting machine that meets the requirements of this Act, and thereupon such voting machine may be used at any and all elections held in such counties, or in any part thereof, for voting, registering, and counting votes cast at such elections. Voting machines of different kinds may be adopted for different districts in the same county. Acts 1929, p. 339, § 3.

§ 138(27). Experimental use of voting machine.—The county commissioners of such counties, authorized by the last preceding section to adopt a voting machine, may provide for the experimental use, at an election in one or more districts, of a machine or machines which they might thereafter permanently adopt, and the use of such machine or machines at such election shall be as valid for all purposes as if it, or they, had been permanently adopted. Acts 1929, p. 339, § 4.

§ 138(28). Providing machines.—The authorities adopting the use of voting machines shall, as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and thereafter the authorities in charge of elections shall preserve and keep them in repair, and shall have custody thereof when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at an election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within such counties as the officers adopting the same may direct. Acts 1929, p. 340, § 5.

§ 138(29). Payment for machines.—The boards of county commissioners of such county on the adoption and rental or purchase of voting machines may provide for the payment therefor in such manner as they may deem for the best interest of their respective localities. Acts 1929, p. 340, § 6.

§ 138(30). Printing official ballots.—All ballots shall be printed on paper of clear white material, of such form and size as will fill the ballot frames of the machines, in plain color type as large as the space will reasonably permit. Party nominations shall be arranged on each voting machine, either in columns or horizontal rows; the caption of the various ballots on said machines shall be so placed on said machines as to indicate to the voter that push knob, key lever, or other device is to be used or operated in order to vote for the candidate or candidates of his choice. The order of arrangement of parties and of candidates shall be as now required by law. Acts 1929, p. 340, § 7.

§ 138(31). Mailing of sample ballots and furnishing of instruction ballots.—The officer or officers, whose duty it may be under this Act to provide and furnish official ballots for any polling place where a voting machine is to be used,

shall also provide two sample ballots or instruction ballots which sample or instruction ballots shall be arranged in the form of a diagram showing such portion of the front of the voting machine as it will appear after the official ballots are arranged thereon or therein for voting on election day. Such sample ballots shall be open to the inspection of all voters on election day, in all primaries and general elections where voting machines are used.

There shall be furnished to the election official, at each polling place, a sufficient number of sample ballots (a facsimile of the face of the machines) of a reduced size, so that one may be given to each voter desiring the same. Acts 1929, p. 341, § 8.

§ 138(32). Number of official ballots to be furnished.—Two sets of official ballots shall be provided each polling place for election district for use in and upon the voting machine, one set thereof shall be inserted or placed in or upon the voting machine and the other shall be retained in the custody and possession of the Board of Elections, unless it shall become necessary during the course of the election to make use of the same upon or in the voting machine. Acts 1929, p. 341, § 9.

§ 138(33). Duty of authorities of municipalities.—It shall be the duty of the authorities in charge of any election, where a voting machine is to be used, to have the machine and all necessary furniture and appliances at the proper polling place or places before the time fixed for opening of the polls, and the counters set at zero (000), and otherwise in good and proper order for use at such election; and for the purpose of placing ballots in the ballot frames of the machine, putting it in order, testing, and adjusting and delivering the machines, the authorities in charge of elections may employ one or more competent persons to be known as custodian or custodians of voting machines, who shall be fully competent, thoroughly instructed, and sworn to perform their duties honestly and faithfully, and for such purpose shall be appointed and instructed at least thirty days before the election and shall be considered as officers of election. Before preparing a voting machine for any election, written notice shall be mailed to the chairman of the local organization of at least two of the principal parties, stating the time and place where the machines will be prepared, at which time one representative of each of such political parties shall be afforded an opportunity to see that the machines are in proper condition for use in the election; such representatives shall be sworn to faithfully perform their duties and shall be regarded as election officials, but shall not interfere with the custodians or assume any of their duties. When a machine has been so examined by such representatives it shall be sealed with a numbered metal seal. Such representatives shall certify to the numbers of the machines, that all of the counters are set at zero (000), and as to the number registered on the protective counter, if one is provided, and on the seal. After the preparation of the machines an officer or officers, or

some one duly authorized, other than the person who has prepared them for election, shall inspect each machine, and report in writing, concerning the facts as to whether or not all of the registering courts are set at zero (000), the machine is arranged in all respects in good order for the election and locked, and as to the number registered on the protective counter, and on the seal. When a voting machine has been properly prepared for election it shall be locked against voting and sealed; and the keys thereof shall be delivered to the board of officials having charge and control of elections, together with a written report made by the custodian, stating that it is in every way properly prepared for the election. After the voting machines shall be transferred to the polling places it shall be the duty of the local authorities to provide ample protection against molestation or injury to the machine. The lantern or electric-light fixture shall be prepared in good order for use before the opening of the polls. Acts 1929, p. 341, § 10.

§ 138(34). Instruction to election officers.—Not less than ten nor more than twenty-one days before each election the custodian or custodians of the machine shall instruct the board of elections that are to serve in an election district in the use of the machine, and in their duties in connection therewith; and he shall give to each member of the board of elections who has received such instruction and is fully qualified to properly conduct the election with the machine a certificate to that effect. For the purpose of giving such instructions the custodian shall call such meeting or meetings of the board of elections as shall be necessary. Such custodian shall, within five days, file a report with the board or official in charge of elections, stating that he has instructed the election officers, giving the names of such officers, and the time and place where such instruction was given. The board of elections of each election district in which a voting machine is to be used shall attend such meeting or meetings as shall be called for the purpose of receiving such instruction concerning their duties as shall be necessary for the proper conduct of the election with the machine. No member of any board of elections shall serve in any election at which a voting machine is used, unless he shall have received such instruction and is fully qualified to perform the duties in connection with the machine, and has received a certificate to that effect from the custodian of the machines; provided, however, that this shall not prevent the appointment of a person as a member of the board of elections to fill a vacancy in an emergency. Acts 1929, p. 343, § 11.

§ 138(35). Instruction to voters before elections.—Where voting machines are to be used, the authorities in charge of elections shall designate suitable and adequate times and places where voting machines containing sample ballots showing titles of offices to be filled, and, so far as practicable, the names of candidates to be voted for at the next election, shall be exhibited for the purpose of giving instructions as to the

use of voting machines to all voters who apply for the same. No voting machine which is to be assigned for use in an election shall be used for such instruction after having been prepared and sealed for the elections. During public exhibition of any voting machine for the instruction of voters previous to an election, the counting mechanism thereof shall be concealed from view and the doors may be temporarily opened only when authorized by the board or official having charge and control of the elections. Acts 1929, p. 343, § 12.

§ 138(36). Official ballots furnished.—Official ballots of the form and description set forth in this Act for use upon voting machines shall be prepared and furnished in the same manner, at the same time, and be delivered to the same officials as now provided by law. Acts 1929, p. 344, § 13.

§ 138(37). Number of voters in a district.—Election districts in which voting machines are to be used may be altered, divided, or combined so as to provide that each district in which the machine is to be used shall contain, as nearly as may be, seven hundred and fifty voters, and that each district in which two machines are to be used shall contain, as nearly as may be, one thousand voters, and that each district in which three machines are to be used shall contain, as nearly as may be, one thousand five hundred voters, provided that nothing herein shall prevent any election district from containing a less number than above if necessary for the convenience of the voters. Whenever more than two machines are to be used in a district, one additional member of the board of elections shall be appointed for each additional machine. Acts 1929, p. 344, § 14.

§ 138(38). Furnishing ballots in lieu of ones lost, stolen, etc.—If the official ballots for an election district or precinct at which a voting machine is to be used shall not be delivered in time for use on election day, or after delivery shall be lost, destroyed, or stolen, the clerk or other official or officials, whose duty it now is in such case to provide other ballots for use at such elections in lieu of those lost, destroyed, or stolen, shall cause other ballots to be prepared, printed, or written as nearly as may be of the form and description of the official ballots, and the board of election shall cause the ballots so substituted to be used at the election in the same manner, as nearly as may be, as the official ballots would have been. Acts 1929, p. 344, § 15.

§ 138(39). Voting machines out of order.—In case any voting machine used in any election district shall, during the time the polls are open, become injured so as to render it inoperative in whole or in part, it shall be the duty of the election officers immediately to give notice thereof to the body providing such machine, and it shall be the duty of such body, if possible, to substitute a perfect machine for the injured machine, and at the close of the polls the records of both machines shall be taken, and the votes shown

on their counters shall be added together in ascertaining and determining the results of the election; but if no other machine cannot be repaired in time for use at such election, unofficial ballots made as nearly as possible in the form of the official ballots may be used, received by the election officers and placed by them in a receptacle in such case to be provided by the election officers, and counted with the votes registered on the voting machines; and the result shall be declared the same as though there had been no accident to the voting machine; the ballots thus voted shall be preserved and returned as herein directed, with a certificate or statement setting forth how and why the same were voted. Acts 1929, p. 345, § 16.

§ 138(40). Opening of polls.—The board of election of each district shall attend at the polling place, three quarters of an hour before the time set for opening of the polls, at each election, and shall proceed to arrange within the guard rail the furniture, stationery, and voting machine for the conduct of the election. The boards of election shall then and there have the voting machine, ballots and stationery required to be delivered to them for such election. If not previously done, they shall insert in their proper place on the voting machine the ballots containing the names of the offices to be filled at such election, and the names of candidates nominated therefor. The keys to the voting machine shall be delivered to the election officers at least three quarters of an hour before the time set for opening the polls, in a sealed envelope on which shall be written or printed the number and location of the voting machine, the number of the seal, and the number registered on the protective counter or device, as reported by the custodian. The envelope containing the keys shall not be opened until at least one member of the board from each of two political parties shall be present at the polling place, and shall have examined the envelope to see that it has not been opened. Before opening the envelope, all officers present shall examine the number on the seal of the machine, also the number registered on the protective counter, and shall see if they are the same as the number written on the envelope; and if they are not the same, the machine must not be opened until the custodian or other authorized person shall have been notified and shall have presented himself at the polling place for the purpose of re-examining such machine, and shall certify that it is properly arranged. If the numbers of the seal and protective counter are found to agree with the numbers on the envelope, the election officers shall proceed to open the doors concealing the counters, and each officer shall carefully examine every counter and see that it registers zero (000), and the same shall be subject to the inspection of official watchers. The machine shall remain locked against voting until the polls are formally opened, and shall not be operated except by voters in voting. If any counter is found not to register zero (000) the board of election shall immediately notify the custodian, who shall if practicable adjust the counters at zero (000), but if it shall be impracticable for the custodian to arrive in time to so adjust such

counters before the time set for opening the polls, the election officers shall immediately make a written statement of the designating letter and number of such counter, together with the number registered thereon, and shall sign and post same upon the wall of the polling room, where it shall remain throughout election day, and in filling out the statement of canvass, they shall subtract such number from the number then registered thereon. Acts 1929, p. 345, § 17.

§ 138(41). Irregular ballots.—Ballots voted for any person whose name does not appear on the machine as a qualified candidate for office, are herein referred to as irregular ballots. In voting for presidential electors, a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially of names of persons not in nomination, or wholly of names of persons not in nomination by any party. Such irregular ballot shall be deposited, written or affixed in or upon the receptacle or device provided on the machine for that purpose. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. Acts 1929, p. 347, § 18.

§ 138(42). Location of voting machines.—At all elections where voting machines may be used, the arrangement of the polling room shall be the same as is now provided for by law; the exterior of the voting machine and every part of the polling room shall be in plain view of the election officers; the voting machine shall be placed at least three feet from every wall or partition of the polling room and at least four feet from any table whereat any of the election officers may be engaged or seated. The voting machine shall be so placed that the ballots on the face of the machine can be plainly seen by the election officers and the party watchers when not in use by voters. The election officers shall not themselves, be or permit any other person to be in any position or near any position that will permit one to see or ascertain how a voter votes, or how he has voted. The election officer attending the machine shall inspect the face of the machine after each voter has cast his vote, to see that the ballots on the face of the machine are in their proper place and that the machine has not been injured. During elections the door or other covering of the counter compartment of the machine shall not be unlocked or open, or the counters exposed except for good and sufficient reasons, a statement of which shall be made and signed by the election officers and shall be sent with the returns. No person shall be permitted in or about the polling room except as now provided by law in election where ballots and ballot-boxes are used. Acts 1929, p. 347, § 19.

§ 138(43). Time allowed a voter.—Where a voter presents himself for the purpose of voting, the election officers shall ascertain whether his name is upon the register of voters, and if his name appears thereon and no challenge be

interposed, or, if interposed, be not sustained, one of the election officers, to be stationed at the entrance through the outer guard-rail, shall announce the name of the voter and permit him to pass through the entrance opening in the outer guard-rail to the booth of the voting machine for the purpose of casting his vote; no voter shall remain in the voting machine booth longer than two minutes, unless for good and sufficient reason he be granted a longer period of time by the election officer in charge; and, having cast his vote, the voter shall at once emerge therefrom and leave the polling room by the exit opening in the outer guard-rail; if he shall refuse to leave after the time of two minutes he shall be removed by the election officers; the election officers shall ascertain the name and address of each voter in the manner now provided by law, before he enters the voting machine booth for the purpose of voting; no voter, after having entered and emerged from the voting machine booth, shall be permitted to re-enter the same on any pretext whatever; only one voter at a time shall be permitted to pass the outer guard-rail to vote. Acts 1929, p. 348, § 20.

§ 138(44). Instruction to voters on election day.—For the instruction of voters on any election days there shall, so far as practicable, be provided for each polling place a mechanically operated model of a portion of the face of the machine. Such model, if furnished, shall, during the election, be located on the election officers table or in some other place which the voters must pass to reach the machine, and each voter shall, before entering the machine, be instructed regarding its operation and such instruction illustrated on the model, and the voter given opportunity to personally operate the model; the voter's attention shall also be called to the diagram of the face of the machine, so that the voter can become familiar with the location of the questions and the names of the officers and candidates. In case any voter, after entering the voting machine, shall ask for further instructions concerning the manner of voting, two election officers of opposite political parties, if present, and, if not, two election officers of the same party shall give such instructions to him, but no officer or person assisting a voter shall in any manner request, suggest, or seek to persuade or induce any such voter to vote any particular ticket, or for or against any particular ticket, or for or against any particular candidate, or for or against any particular amendment, question, or proposition. After giving such instructions and before such voter shall have registered his vote, the officers or persons assisting him shall retire, and such voter shall then register his vote in secret as he may desire. Acts 1929, p. 348, § 21.

§ 138(45). Blind or physically disabled voters.—The provisions of the election law relating to the assistance to be given to blind or physically disabled voters shall apply also, where voting machines are used, and the word "booth," when used in such sections, shall be interpreted to include the voting machine inclosure or curtain. Acts 1929, p. 349, § 22.

§ 138(46). Announcing the vote and locking the machine against voting.—Immediately upon the close of the polls the election officers shall lock and seal the voting machine against further voting and open the counter-compartment in the presence of persons who may be lawfully present at that time, giving full view of the counters. The chairman of the board of elections, under the scrutiny of a member of the board of a different political party, if such member desires to be present, shall then in the order of the officers as their titles are arranged on the machine, read and announce in distinct tones the result shown by the counters, and shall then read the votes recorded for each office on the irregular ballots; he shall also, in the same manner, read and announce the vote on each constitutional amendment, proposition, or other question. As each vote is read and announced, it shall be recorded on two statements of canvass by two other members of the board of election inspectors, and when completed shall be compared with the numbers on the counters of the machine. If found to be correct, the result shall be announced by the chairman of the board and the statements of canvass, after being duly certified and sworn to, shall be filed as now provided by law for filing election returns. After the reading and announcing of the vote, and before the doors of the counter-compartment of the voting machines shall be closed, ample opportunity shall be given to any person or persons lawfully present to compare the result so announced with the counters of the machine, and any necessary corrections shall then and thereby be made by the board of election. No tally sheets nor return blanks as required by law for use in election districts where paper ballots are used shall be furnished or used in election districts where voting machines are used, but in lieu thereof there shall be furnished two copies of a statement of canvass to conform to the requirements of the voting machine or machines being used. Acts 1929, p. 349, § 23.

§ 138(47). Locking the machine and returning the irregular ballots.—The election officers shall, as soon as the count is completed and fully ascertained as by this Act required, lock the counter-compartment, and it shall so remain for a period of thirty days, except it be ordered opened by a court of competent jurisdiction. Whenever irregular ballots of whatever description have been voted, the election officers shall return all such ballots in a properly secured package endorsed "irregular ballots," and return and file such package with the original statement of the result of the election made by them. Said package shall be preserved for six months next succeeding such election, and it shall not be opened or its contents examined during that time except by order of a judge of a court lawfully empowered to direct the same to be opened and examined. At the end of said six months, said package may be opened and said ballots disposed of at the discretion of the official or body having charge thereof. Acts 1929, p. 350, § 24.

§ 138(48). Disposition of keys.—The keys of the machine shall be inclosed in an envelope to be supplied by the custodian on which shall be

written the number of the machine and the district and ward where it has been used, which envelope shall be securely sealed and endorsed by the election officers, and shall be returned to the officer from whom the keys were received. The number on the seal and the number registered on the protective counter shall be written on the envelope containing the keys. All keys for voting machines shall be kept securely locked by the officials having them in charge. It shall be unlawful for any unauthorized person to have in his possession any key or keys of any voting machine, and all election officers or persons intrusted with such keys for election purposes, or in the preparation of the machine therefor, shall not retain them longer than necessary to use them for such legal purpose. All machines shall be boxed and stored as soon after the close of the election as possible, and the machine and the boxes for the machines shall at all times be stored in a suitable place. Acts 1929, p. 351, § 25.

§ 138(49). Application of previous article and penal law. — Any unauthorized person found in possession of any such voting machine or keys thereof shall be deemed guilty of a misdemeanor and fined in a sum not less than twenty-five nor more than five hundred dollars, and imprisonment in the county jail, not less than ten nor more than thirty days; and any person wilfully tampering or attempting to tamper with, disarrange, deface, or impair in any manner whatsoever, or destroy any such voting machine while the same is in use at any election, or who shall, after such machine is locked in order to preserve the registration or record of any election made by the same, tamper or attempt to tamper with any voting machine, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the State Prison of this State at hard labor for not less than three nor more than ten years. Acts 1929, p. 351, § 26.

§ 138(50). Application. — All laws relating to elections now in force in this State shall apply to all elections under this Act so far as the same may be applicable thereto; and so far as such provisions are not inconsistent with the provisions of the Act pertaining to the use of the paper ballots and ballot-boxes. Acts 1929, p. 452, § 27.

§ 138(51). Purpose and object.—The purpose and object of this bill is to provide a proper method of experimenting with and trying out what is known as the mechanical balloting or voting machine, and in every case in which the governing authorities of such counties as is hereinbefore described shall adopt and place in use at any precinct or precincts of such counties, the said county commissioners are hereby specifically authorized and empowered to do anything necessary, whether specifically covered by this Act or not, which they shall deem to be requisites to a fair, honest, and satisfactory trial and use of such machine. Acts 1929, p. 352, § 29.

§ 138(52). Present election laws not changed.—

Nothing in this Act shall in any way change, alter, repeal or modify any provision of the present election laws of the State of Georgia, as the same shall now apply to and be operative in any election precinct in which such balloting machine shall not be used. Acts 1929, p. 352, § 29.

§ 138(53). Effective immediately. — This Act shall take effect immediately upon becoming a law. Acts 1929, p. 352, § 30.

THIRD TITLE

CHAPTER 2

The Secretary of State, Treasurer, Comptroller-General, and Attorney-General

ARTICLE 2

Of the State Treasurer

SECTION 10

Bond Commissioner

§ 232. State treasurer ex-officio Bond Commissioner.—The State Treasurer shall be ex-officio Bond Commissioner of this State, and as such he shall receive a salary of \$1,200.00 per annum; and he is hereby authorized to appoint the chief clerk in the treasury department, or some other fit and competent person, to be Assistant Commissioner, and said assistant shall receive a salary of \$1,200.00 per annum; and said Bond Commissioner shall be allowed such sum as may be necessary, not to exceed the sum of \$10,000.00 per annum, for clerical assistance in performing the duties of his office, which said sum, together with the salaries of the Bond Commissioner and the Assistant Bond Commissioner, shall be paid from the State Treasury; it shall be the duty of the Bond Commissioner and his assistant to receive, file, record, care and provide for the deposit of bonds or other securities offered for deposit as the law may direct. Acts 1909, p. 145; 1923, p. 132; 1927, p. 131.

Editor's Note.—The amendment of 1927 wrought many changes in the phraseology of this section. The substantial innovations consist of the provision for a \$12,000 salary for both the Bond Commissioner and the Assistant Bond Commissioner, and the provision for allowance of \$10,000 for clerical assistance, and the source of its payment.

§ 233. Fees of commissioner.—Each and every depositing corporation or individual of whatever name or class, which now has or may hereafter have on deposit bonds or other securities, as the law provides, is hereby required, within sixty days from and after August 14th, 1909, and thereafter

on or before January 15th of each year, to pay the said bond commissioner the following schedules of fees, namely: Bonds or other securities aggregating not over \$5,000.00, \$2.00; not over \$10,000.00, \$3.75; not over \$25,000.00, \$7.50; not over \$50,000.00, \$12.50; not over \$100,000.00, \$20.00; more than \$100,000.00, \$25.00; provided, however, that the W. & A. R. R. lessees shall be exempt from the operation of this section. All fees collected as aforesaid shall be paid into the general funds of the state treasury. In default of the payment of the fees herein prescribed, the bond commissioner shall refuse to accept the deposits required by law to be made, and shall not certify their acceptance until the fee is fully paid each year as herein provided, but shall report said default to the insurance commissioner, who shall suspend or revoke the license of said delinquent company or individual until the fee required under this section is fully paid. Acts 1927, p. 131.

ARTICLE 4

Of the Attorney General

§ 256. Comptroller-general may require his services.

Cited in Avery v. Hale, 167 Ga. 252, 256, 145 S. E. 76.

FOURTH TITLE

General Regulations as to All Officers and Offices

CHAPTER 1

Of Eligibility, Qualification, and Commissions of Officers, and Vacation of Offices

ARTICLE 1

Eligibility and Qualification

§ 258 (§ 223.) Persons ineligible; de facto officers.

Prior Removal for Misconduct.—The conviction of an officer for misbehavior and misconduct in office in the illegal appropriation of public funds, and his removal from office, are equivalent to an adjudication that he is ineligible to hold said office for and during the remainder of the term for which he was elected. McClellan v. Pearson, 163 Ga. 492, 136 S. E. 429.

A county school superintendent is a county officer within the provisions of par. 7 of this section. Culbreth v. Canady, 168 Ga. 444, 148 S. E. 102.

§ 261 (§ 226.) Officers of this State must reside therein, hold until successor is qualified, and keep seal.

Liability on Bond Continues.—The effect of this section is to extend the term of office under the original appointment until a successor has been qualified, with the further effect

that liability on an official bond continues where an official elected for a fixed period thereafter holds over, after its expiration, until his successor is appointed. Elberton v. Jones, 35 Ga. App. 536, 133 S. E. 745.

Cited in Wiley v. Douglas, 168 Ga. 659, 664, 148 S. E. 735.

Applied in Bashlor v. Bacon, 168 Ga. 370, 372, 147 S. E. 762.

ARTICLE 2

How Commissioned

§ 263. What officers commissioned under executive seal.

See notes to § 1780.

An inspector of fertilizer is not such a civil officer as must be commissioned by the Governor under this section. Talmadge v. Cordell, 167 Ga. 594, 146 S. E. 467.

ARTICLE 3

Vacancies

§ 264. Offices, how vacated.

A person holding the office of justice of the peace in this State does not vacate the office by ceasing to be a resident of the district for which he was elected, where he continues to reside within the State, and where the fact of his cessation of residence has not been judicially ascertained. Long v. Carter, 39 Ga. App. 508, 147 S. E. 401.

Cited in Wiley v. Douglas, 168 Ga. 659, 148 S. E. 735.

CHAPTER 2

Official Oaths

§ 272. Official oaths must be filed in executive office, when.

See notes to § 1782.

Cited in Decatur County v. O'Neal, 38 Ga. App. 158, 162, 142 S. E. 914; Talmadge v. Cordell, 167 Ga. 594, 146 S. E. 467.

CHAPTER 3

Official Bonds and Sureties Thereon

ARTICLE 5

Bonds; How Far and for What Binding

§ 291 (§ 256.) Official bonds obligatory.

Color of office is defined in Fidelity, etc., Company v. Smith, 35 Ga. App. 744, 748, 134 S. E. 801, quoting Luther v. Banks, 111 Ga. 374, 36 S. E. 626.

When Acts Colore Officii—Illustration.—An officer shooting at the occupants of an automobile who have fled from an attempted arrest for a misdemeanor (illegal transportation of liquor) commits a wrongful act under color of his office. Copeland v. Duneahoo, 36 Ga. App. 817, 138 S. E. 267.

Acts Entirely Unauthorized Not Breach of Bond.—A tax-

collector, having no authority of law whatever to make levies and sales under tax f. fas., issued a f. fa. purporting to be for taxes due, and placed it in the hands of another as his deputy, who, "armed" with the f. fa. and acting under the instructions of the tax-collector, seized property of the alleged taxpayer and sold it, to the owner's damage. It was held that such acts constituted no breach of the tax-collector's bond and the surety on the bond was not liable therefor. *Fidelity, etc., Co. v. Smith*, 35 Ga. App. 744, 134 S. E. 801.

ARTICLE 10

Measure of Damages on Bonds

§ 299 (§ 264.) Measure of damages.

Meaning of "Smart-Money."—The term "smart-money," as employed in this section seems to be substantially synonymous with "punitive damages." *Copeland v. Dunehoo*, 36 Ga. App. 817, 821, 138 S. E. 267. Thus this section seems to be an exception to section 4393. *Id.*

What Amounts to Bad Faith.—Any arbitrary omission by the officer to do that which is required of him by law, or any conscious disregard of the limitation upon his authority, would amount to bad faith within the meaning of that term as employed in this section. *Copeland v. Dunehoo*, 36 Ga. App. 817, 824, 138 S. E. 267. See note of this case under sec. 2549.

Statement of Injury.—In an action for damages because of the alleged breach of the official bond of a former clerk of a city court, it not appearing from the petition that any actual injury was sustained by the plaintiff by reason of the alleged breach, the petition did not set out a cause of action. *Donaldson v. Walker*, 35 Ga. App. 224, 132 S. E. 649.

CHAPTER 4

Powers of Public Officers Limited

§ 303 (§ 268.) Powers of public officers.

As to liability on unauthorized acts of school trustees, see note to sec. 1551(141).

When Public Is Estopped—Statements Without Authority.—In *Gill v. Cox*, 163 Ga. 618, 137 S. E. 40, it was held that the state is not estopped by statements made by the state veterinarian, said statements not being made in the exercise of any legal authority.

The public under this section is not estopped by the unauthorized acts of its agents. *County Com'rs v. O'Neal*, 38 Ga. App. 158, 142 S. E. 914, 916.

CHAPTER 6

Inventory Annually to Be Made

Cited in *City of Dawson v. Terrell County*, 38 Ga. App. 676, 783, 145 S. E. 465; *Goodin v. McRae*, 163 Ga. 293, 135 S. E. 911.

§ 314. "Proper authority."

Public property becomes "unserviceable * * * where such property can not be beneficially or advantageously used under all the circumstances." *Dawson v. Terrell County*, 38 Ga. App. 676, 678, 145 S. E. 465.

CHAPTER 7

Salaries and Fees of Officers

ARTICLE 5

Officers Connected with the Judicial Department

§ 328. Fees of solicitor-general.

As to validity of act abolishing fee system in Chatta-

hoochee Circuit, see *Harris v. Williams*, 167 Ga. 45, 144 S. E. 756.

Cited in *American Surety Co. v. Kea*, 168 Ga. 228, 147 S. E. 386.

FIFTH TITLE

Legislative Department

CHAPTER 1

Of the General Assembly

ARTICLE 8

Pay of Members

§ 354 (§ 312.) Accounts of members and officers, how audited.

In General.—By this section a method is provided for determining what compensation, including per diem, is due to the members of the General Assembly. This statute establishes a special tribunal for the determination of the matter in question. There certainly should be no judicial interference with this method and this tribunal, before any action is taken by this special tribunal, by assuming that it will certify per diem to which members are not entitled under the constitution. *Speer v. Martin*, 163 Ga. 535, 537, 136 S. E. 425.

SIXTH TITLE

County Organization

CHAPTER 2

Incorporation of Counties, County Contracts, Property, and Claims

ARTICLE 1

Counties Are Corporate Bodies

§ 383 (§ 340.) Each county a body corporate.

Construed with Section 384.—Sections 383 and 384 must be construed together, and they must receive a reasonable construction. *Decatur County v. Praytor, etc., Co.*, 163 Ga. 929, 931, 137 S. E. 247.

Extent of Power Conferred.—This section subjects the counties of this State to suit, but not to suits upon all causes of action. It does not make them generally liable to suits like individuals or as municipal corporations. Being political subdivisions of the State, they can not be sued unless made subject to suit expressly or by necessary implication. *Decatur County v. Praytor, etc., Co.*, 163 Ga. 929, 931, 137 S. E. 247.

A county can always be sued upon any liability against it created by statute, or for breach of any valid contract which it is authorized by law to make. *Decatur County v. Praytor, etc., Co.*, 163 Ga. 929, 935, 137 S. E. 247. See sec. 384 and the notes thereto.

Cited in *City of Dawson v. Terrell County*, 38 Ga. App. 676, 783, 145 S. E. 465.

ARTICLE 2

Suits against Counties

§ 384 (§ 341.) County, when liable to suit.

Editor's Note.—This section was codified from the deci-

sions of the court in the cases of *Hammond v. Richmond*, 72 Ga. 188, and *Smith v. Wilkes & McDuffie Counties*, 79 Ga. 125, 4 S. E. 20, and it must be construed in the light of these decisions. See *Decatur County v. Praytor, etc., Co.*, 163 Ga. 929, 932, 137 S. E. 247.

Broad Terms.—Language could not be broader or more comprehensive, or more free from doubt, than the words of this section. When it says the county shall not be liable for any cause of action, it expressly negatives the idea of exceptions other than provided therein, to wit, “unless made so by statute.” *Wood v. Floyd County*, 161 Ga. 743, 745, 131 S. E. 882.

General Rule.—Whenever a county is by statute made liable for a given demand, an action against it will lie therefor, though the statute does not in express terms authorize or provide for the bringing of such an action. *Decatur County v. Praytor, etc., Co.*, 163 Ga. 929, 933, 137 S. E. 247, citing numerous cases.

Liability in Case of Bridges.—A county is liable to suit by contractors for breach of a valid and binding contract for the building of a bridge over a river in such county, upon the assumption that the difference between the representations in the plans and specifications as to the facts and conditions under the bed of the river, and the actual facts and conditions thereof, amounted to a breach of the contract by the county. *Decatur County v. Praytor, etc., Co.*, 163 Ga. 929, 137 S. E. 247.

When County Officials Exceed Powers.—“When public officers, in discharging duties imposed upon them by law, undertake other duties not imposed by law, although intending it to be a benefit to the public, the latter, as represented by county governments, can not be made responsible for torts or ultra vires contracts.” *Wood v. Floyd County*, 161 Ga. 743, 748, 131 S. E. 882.

Petition Must Show Liability by Statute.—The petition in a suit brought against a county must indicate that the liability sought to be established comes within the provisions of the rule of this section. *Fulton County v. Gordon Water Co.*, 37 Ga. App. 290, 140 S. E. 45.

Cited in *City of Dawson v. Terrell County*, 38 Ga. App. 676, 783, 145 S. E. 465.

ARTICLE 3

Contracts, How Made by Counties, Competition in Bidding

§ 386. Contracts with ordinary.

Sufficiency of Entry.—In *King v. Casey*, 164 Ga. 117, 121, 137 S. E. 776, it is said: “The present record shows that the contract was entered upon the minutes of the board of commissioners of roads and revenues, but that certain specifications were omitted; it was legal for the judge to order the entry of the contract on the minutes, in which event the restraining order should be dissolved and of no further effect.”

Mandamus will lie to compel county authorities to enter such contract on their minutes. *King v. Casey*, 164 Ga. 117, 121, 137 S. E. 776, citing *Wagener v. Forsyth County*, 135 Ga. 162, 68 S. E. 1115.

§ 389. Contracts to give bonds; counties with chaingangs.

Since the passage of the act of 1920 to amend this section, counties having a chain-gang may purchase material for and use the convicts in building or repairing any public building, bridge, causeway, or other public works, and may use the funds arising from taxes levied for such purposes, in purchasing such material and in supporting and maintaining the convicts while such work is being done. *Southern Ry. Co. v. Whitfield County*, 38 Ga. App. 703, 145 S. E. 668.

§ 389(c). Park's Code.

See § 389(1).

§ 389 (1). Contract for public work void without bond.

What Constitutes “Doing Work.”—An employee of the con-

tractor is not doing work “under and for the purpose of” the contract where he is engaged only in “winding up the affairs” of his employer in the particular location, such as collecting and looking after the machinery and “shipping it to the next work they were going to do,” all of this being done after the work had been fully completed and after the municipality has formally and finally accepted the same as a compliance with the contract between it and the contractor. *Southern Surety Co. v. Williams*, 36 Ga. App. 692, 137 S. E. 851.

Bond Protects Two Classes.—The bond required by this section is for the use of two classes of persons: first, the municipality, and second, “all persons doing work or furnishing skill, tools, machinery, or materials under or for the purpose of such contract.” Both classes of persons are entitled to protection under the bond. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 212, 130 S. E. 577.

Necessity of Stating “Use” in Bond.—In an action by the trustees of a school district “for the use” of a materialman, who furnished material used in the construction of a school building, against a bonding company as surety upon the bond given by the contractor, where the bond contained no provision that it was given “for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery or materials under or for the purpose of such contract,” nor any similar clause, but specifically provided that “no right of action shall accrue for the use or benefit of any other than the obligee,” the trustees can have no recovery on the bond merely “for the use” of the materialman. *Massachusetts Bonding, etc. Co. v. Hoffman*, 34 Ga. App. 565, 130 S. E. 375.

A bond which does not use the words “for the use of,” but the expressed obligation is to both “the City of Thomasville” and “all persons doing work or furnishing skilled labor, tools, machinery, or materials under or for the contract,” is a sufficient statutory bond under the section, notwithstanding it does not expressly employ the words “for the use of” the municipality or the members of the other class. Being such statutory bond, a materialman, coming under the second class of obligees can in his own name bring a suit on a certified copy thereof, as is expressly provided in section 389 par. 4. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 211, 130 S. E. 577.

Bond Covering Two Principals.—Where a bond specifies two corporations as principal and a surety company as security, and a suit is brought on the bond by a person of the second class, who alleges in the petition that certain materials for which he seeks a recovery were furnished by him to one of the corporations named as principal, and that only one of such principals contracted with the municipality, such allegation would not alone operate to discharge the surety on the bond. In the absence of fraud, accident, or mistake inducing the surety to execute the bond, he will be bound by his contract as surety for both of the corporations named as principals in the bond, and will not be relieved by mere allegation in the petition that only one of the named principals to whom the materials were alleged to have been furnished was a contractor with the municipality. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 213, 130 S. E. 577.

Liability of County for Failure to Take Bond.—A county which has failed to take from the contractor the statutory bond required under this act, is liable to any person furnishing material to the contractor for the purpose of the contract, for any loss resulting to such person from the failure of the county to take the required bond. *Decatur County v. Southern Clay Mfg. Co.*, 34 Ga. App. 305, 129 S. E. 290; *Ty Ty Consol. School Dist. v. Colquitt Lumber Co.*, 153 Ga. 426, 112 S. E. 561, and *Hannah v. Love-lace-Young Lumber Co.*, 159 Ga. 856, 127 S. E. 225, were cited in this case. Ed. Note.

Same—Necessity for Work to Be Completed.—It is not essential to the county's liability under this act that the work for which the county contracted shall have been completed. *Decatur County v. Southern Clay Mfg. Co.*, 34 Ga. App. 305, 129 S. E. 290.

Notice as Affecting Liability of Public Body.—A public body can not, by notice to a materialman of its intention to pay direct to the contractor all bills for material which may be furnished to the contractor by the materialman for the purpose of the contract, and that it will not be liable to the materialman for such material, relieve itself of the statutory liability imposed upon it by this act, for loss to a materialman resulting from the failure of the public body to take the bond required. Nor will such notice to the materialman operate to estop him from asserting his right, under the statute, to hold the public body liable. *Board v. United States Supply Co.*, 34 Ga. App. 581, 131 S. E. 292.

Suit on Bond by Materialman, Workers, etc.—A materialman furnishing material to the contractor in making the improvements specified in the contract can in his own name, where the city fails to sue in the time prescribed by the act, maintain an action on the bond, although the bond does

not expressly state that it is "for the use of" persons furnishing material for construction of the improvement. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 130 S. E. 577.

Substitutions of Parties Plaintiff.—Where a materialman improperly brought suit in his own name against the surety, and it appeared that under the terms of the bond no indemnity was provided in behalf of the materialman, an amendment was not allowable making the suit proceed in the name of the county for the use and benefit of the materialman. *American Surety Co. v. Bibb*, 162 Ga. 388, 134 S. E. 100.

§ 389(d). Park's Code.

See § 389(2).

§ 389 (2). Approval and filing of bond.

Trustees Not Surety Liable.—The liability of the trustees under this section, if existing, would not be one in which the surety on the bond actually taken would be concerned where the bond contained no provision for the assumption of it. In other words, if it could be said that the trustees had subjected themselves to liability to the materialman in failing to take a proper bond, the resulting damage to them would flow from their own default, and not from the failure of the contractor to perform his contract. The surety on the bond which they actually obtained would not ordinarily be liable for damage suffered by them because of their failure to comply with the law and take a bond of different character. *Massachusetts Bonding, etc., Co. v. Hoffman*, 34 Ga. App. 565, 568, 130 S. E. 375.

§ 389(f). Park's Code.

See § 389(4).

§ 389 (4). Action on bond.

In General.—This section specifies the order in which each class may sue on the bond. The municipality primarily may bring a suit on the bond, in which event the remedy of any person in the second class is by intervention in such suit; but if the municipality does not bring a suit within 90 days after the completion of the contract and acceptance by the municipality, any person of the second class may bring a suit upon the bond for the enforcement of any right concerning which the bond affords him protection. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 212, 130 S. E. 577.

This section is express authority for a person of the second class who has furnished material to a contractor for making a public improvement, to bring an individual suit upon the bond for his own benefit. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 215, 130 S. E. 577.

Purpose of Provision for Certified Copy of Bond.—The provision for the obtainment of a certified copy of the bond and the basing of a suit thereon is for convenience of persons entitled to sue on the bond, and is not to be construed as requiring a suit to be based on such certified copy rather than upon the original bond. To make such requirement would place the certified copy above the original bond, with no reason for making any such technical distinction. The cause of action, if any, arises from the contract embodied in the bond, not from the primary or secondary character of the paper that might be set out in a petition suing on the bond. *Southern Surety Co. v. Dawes*, 161 Ga. 207, 212, 130 S. E. 577.

ARTICLE 5

County Buildings, Care and Inspection Thereof; Supplies for County Offices

§ 400. Public buildings and records.

The officers having jurisdiction of the county affairs are not deprived of all discretion, by this section as to the manner of providing a court-house or the character of the building or its equipment. On that subject the county authorities have a broad discretion, which should not be disturbed by the courts except cautiously, nor unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law. *Manry v. Gleaton*, 164 Ga. 402, 138 S. E. 777; *Cowart v. Manry*, 166 Ga. 612, 144 S. E. 21.

§ 401. Court-house rooms.

The expression "county officers," as used in this section, refers to those officers who are such in the strict sense of the term—that is, those who are constitutional county officers; and they are such, under the provisions of the constitution, as "shall be elected under section 6599 of the Constitution. It does not apply to a city-court solicitor. *Graham v. Merritt*, 165 Ga. 489, 491, 141 S. E. 298.

ARTICLE 6

Claims against Counties

§ 411 (§ 362.) Claims to be presented, when.

See notes to § 910.

In General.—Under this section a cause of action against a county such as can be recovered upon does not exist unless the claim has been presented within twelve months after its accrual. *Atlantic Coast Line R. Co. v. Mitchell County*, 36 Ga. App. 47, 48, 135 S. E. 223.

Allegation of Time.—An action against a county, brought in 1923, to recover taxes alleged to have been illegally levied and collected in 1919, and alleging that a month before the filing of the suit a demand that the taxes so collected be refunded was made upon the county authorities and refused, was barred, under this section. *Atlantic Coast Line R. Co. v. Mitchell County*, 36 Ga. App. 47, 135 S. E. 223.

County Warrants.—County warrants are not such claims as are required by this section to be presented within twelve months after they accrue for the statute of limitations does not begin to run against county warrants until a demand for payment is repudiated or a fund out of which they can be paid is provided. *Central, etc., R. Co. v. Wright*, 35 Ga. App. 144, 132 S. E. 449.

Claim of Payee of Void Note.—A claim against a county by a payee of a void note for money used by the county and paid out on outstanding valid warrants, even if enforceable against the county, was barred under this section, where not presented within 12 months after accrual. *Farmer's Loan, etc. Co. v. Wilcox County, Ga.*, 2 Fed. (2d), 465.

Salary of Commissioner.—This section is not applicable to allowances for salary of the road commissioner under a local law as his salary is an allowance provided by law for the benefit of the commissioner as a public officer, and has no reference to contract or breach of duty. *Sammons v. Glascock County*, 161 Ga. 893, 131 S. E. 881.

Applied in suit to recover money paid to county on void tax titles. *Newsome v. Treutlen County*, 168 Ga. 764, 149 S. E. 44.

This section bars the claim where the injury for which damages were sought (destruction of the value of land) occurred in 1924 and the claim was not presented until 1927. *Effingham County v. Zittrouer*, 39 Ga. App. 115, 146 S. E. 351.

Cited in *Habersham v. Cornwall*, 38 Ga. App. 419, 144 S. E. 55; *Baggett v. Barrow*, 166 Ga. 700, 144 S. E. 251.

ARTICLE 8

County Auditors and Expert Accountants

§ 418(1). Auditors for counties of 25,860 to 25-865 population.—In all counties of the State of Georgia which have a board of commissioners of roads and revenues and which counties also have a population, according to the United States Census of 1920, of not more than 25,865 and not less than 25,860, the board of commissioners, when they deem it necessary, may appoint an auditor for their respective counties. Acts 1929, p. 212, § 1.

§ 418(2). Duty of auditor.—It shall be the duty of such county auditor, under the direction of his respective board of commissioners and in accordance with such rules as may be prescribed

by said board, to audit the orders drawn on the county treasurer by the judge of the superior court and the judge of the city court of the county. Acts 1929, p. 212, § 2.

§ 418(3). Orders on treasurer not to be paid unless approved by auditor.—Be it further enacted that no order drawn by the judge of any court against the treasury of any county having an auditor under the provisions of this act shall be paid by the treasurer of such county unless the same has been approved by the county auditor. Acts 1929, p. 212, § 3.

§ 418(4). Term of office.—Term of office of such auditor shall be one year from the date of his appointments, and the county commissioners may discontinue the office of county auditor at any time they may deem best. Acts 1929, p. 212, § 4.

§ 418(5). Auditor to be clerk of county commissioners.—The said county auditor shall be the clerk of the county commissioners and shall receive no additional compensation for his services as county auditor, other than his salary as said clerk of the county commissioners. Acts 1929, p. 213, § 5.

ARTICLE 8a

Expenses of Office

§ 418(6). Office expenses of officers of counties of 44,000 to 150,000 population.—In all counties described in the second paragraph of this section, the necessary office expenses of the officers herein named shall, when approved by the county board of commissioners or other fiscal agent of said county, be paid out of the treasury of such county monthly, and each of said officers is required to furnish to the county commissioners or other fiscal agent an itemized statement of such necessary expenses at the first regular meeting of such board or fiscal agent in each month; provided the counties aforesaid shall only be liable for the payment of such items of expense as are approved by such board of commissioners or other fiscal agent.

This section shall apply to all counties in the State of Georgia having by the United States census of 1920 a population of forty-four thousand inhabitants and less than one hundred and fifty thousand inhabitants and to all counties in this State which may have by any future census of the United States a population of forty-four thousand inhabitants and less than one hundred and fifty thousand inhabitants. Acts 1929, p. 303.

Editor's Note.—This act refers to "the officers herein named" without naming any, however the title of the act is "to provide for the payment of office expenses of the clerk of the superior court (whether he be clerk of the superior court only or ex-officio clerk of other courts), the sheriff, the ordinary, the tax-collector and the tax-receiver in certain counties in Georgia," etc.

ARTICLE 11A

Co-operation of Counties with Municipalities for Improvements

§ 431 (1). Co-Operation lawful.

Cited in Decatur County v. Praytor, etc., Contracting Co., 163 Ga. 929, 935, 137 S. E. 247.

§ 431 (2). City improvements through county funds.

Prior to the passage of this act there was no statute which authorized a county and a city to jointly pave and improve the street of a city. The municipalities referred to in that act are authorized (without regard to the nature of their charters at the time of the passage of the act) to expend money jointly with the county, and "in such cases" to assess part of the cost of paving or improving against abutting property and the owners thereof. Mayor v. Brown, 168 Ga. 1.

§ 431 (3). Contracts; assessments by municipality.

This last clause of this section is not altogether clear in expression, but properly construing the entire section together, in view of the express purpose of the legislation, the endeavor to make express provisions for cases where by previous charter provisions, ordinances, or laws of the State the particular municipality was not theretofore authorized to assess was entirely needless and useless in view of the previous provision which authorized the co-operation of the county and city under the provisions of the act and the prior authority already conferred upon the municipality to exercise any power provided in its charter or ordinances or any power arising under the general law of the State. This provision included all municipalities, whether they had charter provisions or ordinances upon the subject of assessments or not. The apparent ambiguity in the last clause of this section is removed when the language employed is construed in connection with the caption and the clear provisions immediately preceding it, which gave all municipalities of the State the right, if they chose, of proceeding under the general law. Mayor v. Brown, 168 Ga. 1.

It is specifically provided in the act of 1925 that whatever the county may pay upon the cost of the joint project is not to be applied for any other purpose than the joint construction of the highway. Such sum as represents the county's share of the costs of construction is not to be used as a contribution to abutting landowners as well as other tax payers of the municipality, but it to be used to increase the city's power to do its share of the improvement. Mayor v. Brown, 168 Ga. 1.

The declaration, in this section that in carrying out its purposes the municipality shall have and exercise any power provided in its charter or ordinances or in the general law of the State, is not a provision requiring that there shall be in the charter any authority to assess, or that there shall be existing ordinances authorizing the municipality to assess. The power may arise from the general law of the State. The act of 1925 is a general law of the State; and if in a given instance a municipality has no charter authority and no ordinance upon the subject, it is expressly permitted to fall back and rely upon any pertinent general law of the State upon the subject. Mayor v. Brown, 168 Ga. 1.

ARTICLE 11B

Residue of Bond Issue Used for Improvements

§ 431 (4). Use of balance of proceeds of bond issue, to pay warrants in certain counties.—The ordinaries or boards of county commissioners, or other county authorities in this State where such boards exist, and who have the management of the revenues of the counties, in all the counties in

this State having a population of not less than 11,170 nor more than 11,200 according to the 1920 census, are hereby authorized and empowered, whenever the purposes of a county bond issue has been accomplished, which fact is to be judged of by said county authorities in their discretion, and there remains a balance of the proceeds of said bond issue on hand, to use said balance in the satisfaction of outstanding warrants representing the costs of permanent county improvements, or in making permanent county improvements. Acts 1927, p. 215.

ARTICLE 12

System of Drainage

§ 439(ee). Park's Code.

See § 439(31).

§ 439(31). Assessments for cost of drainage.

Execution.—Pursuant to this section it is held that "an execution could be issued by the tax-collector for the collection of such assessment, directed to any lawful officer to execute and return, commanding such officer that by levy and sale of the lands and tenements of a named owner, 'known as tract No. 19 in Spalding County drainage district No. 1,' being the land upon which the assessment was levied, 'he cause to be made' the amount of such assessment." Pursley v. Manley, 166 Ga. 809, 144 S. E. 242.

The assessment being against the designated tract of land, and the execution issued by the tax-collector commanding the levying officer to sell that tract, thus being an execution in rem, the same could issue after the death of the owner of the land so assessed; and such execution, the levy and sale of said land thereunder, and the sheriff's deed made in pursuance of such sale, are not null and void for the reason that the owner of the land was dead at the time of the issuing of such execution. Pursley v. Manley, 166 Ga. 809, 144 S. E. 242.

§ 439(ii). Park's Code.

See § 439(34).

§ 439 (34). Bonds for drainage, how issued and collected.

Sale of Bonds as Prerequisite to Validity of Contract.—A contract is not in any wise invalid by reason of the fact that there has been no actual sale of drainage bonds, assessments for the improvements having been previously made to an amount exceeding the total amount of the drainage contract. Board v. Williams, 34 Ga. App. 731, 732, 131 S. E. 911.

Effect of Collection upon Validity of Contract.—Where the total liability under the drainage contract was within the total amount of assessments, the contract was not thereafter rendered invalid by reason of the fact that such assessments were not collected or enforced, or by reason of the fact that the full par value of all the drainage bonds sold did not come into the district treasury, as this act requires. Board v. Williams, 34 Ga. App. 731, 733, 131 S. E. 911.

Redemption of Land Sold.—This law does not expressly give the right to redeem where land is sold under execution issued for an assessment to meet principal or interest, or the cost of draining the land, in a drainage district. Sigmon-Reinhardt Co. v. Atkins Nat. Bank, 163 Ga. 136, 135 S. E. 720.

The only language of this section bearing upon exemptions simply means that executions issued to collect an assessment are collected in the same manner as tax executions are collected. The procedure for their collection is the same as the procedure for the collection of tax executions. This is a different thing from giving to any lienholder, or person having an interest in the land, the right

to redeem. Sigmon-Reinhardt Co. v. Atkins Nat. Bank, 163 Ga. 136, 138, 135 S. E. 720.

CHAPTER 3

County and Municipal Bonds and Debts—Sinking Funds

ARTICLE 1

Election on Issue of Bonds or Incurring New Debt

§ 440 (§ 377). Notice of election on issue of bonds.

I. IN GENERAL.

Issue of Bonds in Installments.—Nothing in the constitution or this section is inconsistent with authorization of an issue of bonds in installments and the levy of the tax for the payment of each installment in the year of its issue. Brady v. Atlanta, 17 Fed. (2d), 764.

Section Must Be Strictly Complied with.—Allen v. City of Atlanta, 166 Ga. 28, 33, 142 S. E. 262.

Cited in Houston v. Thomas, 168 Ga. 67, 146 S. E. 908; Gibbs v. Ty Ty Consol. School Dist., 168 Ga. 379, 147 S. E. 764.

II. SUFFICIENCY OF NOTICE.

Publication—For Thirty Days.—Where it appeared that an election was held on Saturday, January 23, 1926, and that notice thereof had been published in the proper newspaper once a week for six weeks, beginning on Friday, December 18, 1925, and ending on Friday, January 22, 1926, since the notice was inserted the first time at least 30 days before the date of the election and as nearly that precise number of days immediately preceding such date as was possible under the circumstances, the fact that the publication began more than 30 days prior to such date was immaterial and afforded taxpayers no cause for attacking the validity of the notice. Clark v. Union School Dist., 36 Ga. App. 80, 135 S. E. 318.

Notice Affecting Custodian of Funds.—In Bank v. Hagedorn Const. Co., 162 Ga. 488, 134 S. E. 310, it was held that a bank as custodian of the proceeds of county bonds is chargeable with the notice given under this section as to the purpose of the bond issue and must not permit the funds to be used for other purposes.

Ordinance Not Meeting Requirements of This Section Void.—Allen v. City of Atlanta, 166 Ga. 28, 162 S. E. 262.

§ 441(a). Park's Code.

See § 441(1).

§ 444 (1). Bonds of municipalities to be issued without referendum.

By the act of 1921, p. 212, the certificate of the chief of construction, that the petition was signed by the owners of more than fifty per cent of the property abutting on the street or portion of the street sought to be paved, is made prima facie evidence of this fact. The act of 1919 makes this prima facie/presumption conclusive, if the owners do not file objections to the passage of the preliminary ordinance providing for the payment. Montgomery v. Atlanta, 162 Ga. 534, 545, 134 S. E. 152.

ARTICLE 2

Bonds, How Validated

§ 445. Bonds of counties and municipalities, how validated.—When any county, municipality,

or division, desiring to incur any bonded debt, as prescribed in paragraph 1 and 2, section 7, Article 7 of the Constitution, shall hold an election in accordance with the provisions of the Constitution and in accordance with the laws of the State, controlling and regulating such elections, and the returns of said election shall show prima facie that such election is in favor of the issuance of said bonds, the officer or officers of such county, municipality, or division, charged by law with the duty of declaring the result of the election, shall, within six months after so declaring the result of said election, notify the solicitor-general of the judicial circuit in which such county, municipality, or division shall lie, in writing, of the fact that an election for the issuance of bonds was held in such county, municipality, or division, and that the election was in favor of the issuance of such bonds, and the service of said notice shall be personal upon the solicitor-general, and in the event he is absent from the circuit, then it shall be served in person upon the attorney-general of the State. When any municipality having a population of one hundred and fifty thousand (150,000) or more, according to the United States census next preceding the date of issue of the bonds hereinafter referred to, desiring to incur a bonded debt or debts for street improvements and issue and sell street improvement bonds without the assent of two-thirds of the qualified voters thereof, but upon a two-thirds vote of the members of its governing body as provided in Paragraph 1, Section 7, Article 7, of the Constitution of this State as amended by amendment approved August 17, 1920, and duly ratified and proclaimed adopted by the Governor, November 17, 1920, shall, by vote of its governing body in accordance with the provisions of the Constitution and laws of the State, direct the issue of such bonds, the Mayor or Chief Executive official of such municipality, shall, within six months after the adoption of the ordinance evidencing the vote of the governing body of such municipality, notify in writing the Solicitor-General of the Judicial Circuit in which such municipality shall lie, of the fact that an ordinance providing for the issuance of such bonds was duly adopted by said governing body of such municipality, and that the necessary two-thirds vote of said governing body was in favor of the issuance of such bonds, and the service of said notice shall be in person upon the Solicitor-General, and in event he is absent from the Circuit, then it shall be served in person upon the Attorney-General of the State.

When any municipality in the State of Georgia, which, pursuant to article 7, section 7, paragraph 1 of the Constitution of Georgia, as heretofore or hereafter amended, is authorized to issue and sell street-improvements bonds without the assent of two-thirds of the qualified voters at an election called thereon, but upon a majority vote of the members of its governing body, desires to incur a bonded debt or debts for street improvements and so to issue and sell street-improvements bonds, said municipality may, at its option, proceed to have such bonds validated as provided in this Act and in the Code sections herein referred to. When it is so desired to have such bonds validated, the Mayor or governing body of said

municipality shall, within six months after the final passage of an ordinance providing for the issuance of such bonds, notify in writing the Solicitor-General of the judicial circuit in which such municipality is located, of the fact that an ordinance for the issuance of such bonds was duly adopted by a majority vote of the governing body of said municipality, and the service of said notice shall be upon such Solicitor-General in person; and in the event that he is absent from his circuit, then the notice shall be served in person upon the Attorney-General of the State. Acts 1897, p. 82; 1920, p. 633, 192, p. 92; 1929, § 1.

Rights of Taxpayers Who Failed to Make Themselves Parties.—Where an election, held to determine whether municipal bonds should be issued, resulted in favor of such issuance, and the bonds were duly validated in accordance with this and the following sections of this article, citizens and taxpayers who could have made themselves parties to the proceedings to validate the bonds, but failed to do so, were concluded by the judgment rendered, and could not thereafter enjoin the collection of a tax to pay the interest and part of the principal falling due, on the ground that some of the bonds were for a purpose not authorized by the constitution. *Jenkins v. Mayor & Aldermen*, 165 Ga. 121, 139 S. E. 863.

§ 446. Duties of the attorney-general or solicitor-general.

Sufficiency of Petition.—It is necessary, of course, to state the facts, and this should be done with sufficient particularity to meet the requirements of good pleading. A petition which fails to show, except by a bare conclusion, that the election resulted prima facie in favor of the issuance of the bonds is fatally defective and subject to general demurrer. *Edwards v. Clarkesville*, 35 Ga. App. 306, 310, 133 S. E. 45.

Same—Unnecessary Allegations.—The law does not require an allegation as to publication of the notice to the voters, or as to the furnishing of the list of the registered voters (it being sufficient merely to show the number of such voters), or as to the city's indebtedness not exceeding the limit allowed by the constitution. *Edwards v. Clarkesville*, 35 Ga. App. 306, 310, 133 S. E. 45.

§ 447. Trial of the case and bill of exceptions.

Court Can Determine Validity of Votes.—In a proceeding to validate bonds, it is within the power and jurisdiction of the superior court, upon proper pleadings and sufficient evidence, to pass upon the validity of any votes cast in the election, and to eliminate such votes as are shown by the pleadings and the evidence to be illegal. *Turk v. Royal*, 34 Ga. App. 717, 131 S. E. 119.

Burden on State to Prove Material Facts.—See *Clay v. Austell School Dist.*, 35 Ga. App. 109, 132 S. E. 127, quoting the paragraph set out under this catchline in the Georgia Code of 1926.

Final Judgment Prerequisite to Bill of Exceptions.—Where an answer filed by intervenors is dismissed as being insufficient to prevent validation, but the order of dismissal provides merely that the petitioners "may take an order confirming and validating," it does not constitute a final judgment "confirming and validating the issuance of the bonds" from which a bill of exceptions will lie, as provided by this section. *Veal v. Deepstep Consol. School Dist.*, 34 Ga. App. 67, 128 S. E. 223.

Applied in *Gibbs v. Ty Ty Consolidated School District*, 168 Ga. 379, 147 S. E. 764; *Gibbs v. Ty Ty Consol. School Dist.*, 168 Ga. 379, 147 S. E. 764.

§ 448. Judgment validating forever conclusive.

Cited in *Towns v. Workmore Public School District*, 166 Ga. 393, 394, 142 S. E. 877.

§ 461. Bonds for refunding or paying off prior issue.—Any county or municipality, desiring to validate any issue of bonds proposed to be issued for the purpose of refunding or paying off and discharging a prior issue of bonds issued by such

county or municipality, may have the same validated before issuing, in the manner hereinbefore provided, by presenting a petition to the solicitor-general of the circuit in which said county or municipality is located, or to the attorney-general of the State of Georgia when the solicitor-general is absent from his circuit, setting forth a full description of the bonds to be issued, as well as the bonds to be paid off by such refunding issue, with a full copy of the resolution and all proceedings authorizing the original issue of said bonds sought to be paid off by the refunding issue, also resolutions and proceedings authorizing the refunding issue of bonds. Such petition being presented to the solicitor-general, or the attorney-general, as the case may be, it shall be the duty of such officer to bring proceedings for the validation of such issue of refunding bonds in the matter hereinbefore provided, save and except that in such cases the county or municipality seeking the validation of such bonds shall pay all court costs, and the fee of \$25.00 to the solicitor-general. But no bonds shall be allowed validated hereunder that have been issued for a bonded debt created since the Constitution of 1877. Acts 1927, p. 135.

Editor's Note.—Prior to the amendment of 1927 only bonds issued between the adoption of the Constitution of 1887 and the passage of the Act of 1897 could be validated by the operation of this section.

§ 462(1). Sections applicable to validation of street improvement bonds.—All the terms and provisions contained in sections 445, 446, 447, 448, 449, 450, 451, and 455, as hereby amended, of the Code of Georgia of 1910, providing for the validation of the bonds of counties, municipalities, and divisions generally, and the method of procedure thereunder, are hereby made applicable in all proceedings to validate street-improvement bonds which may be issued by any municipality which, pursuant to article 7, section 7, paragraph 1, of the Constitution of Georgia, as heretofore or hereafter amended, is authorized to issue and sell street-improvements bonds without the assent of two thirds of the qualified voters at an election called thereon, but upon a majority vote of the members of its governing body. Acts 1929, p. 153, § 2.

ARTICLE 3

Debts Other Than a Bonded Debt

§ 466. Number of votes; how ascertained.

Cited in dissenting opinion in Tightower v. Keaton, 167 Ga. 94, 96, 144 S. E. 759.

CHAPTER 4

Change of County Lines

§ 468. Change of county lines.

See notes to § 471(1).

§ 471(a). Park's Code.

See § 471(1).

Ga.—2

§ 471(1). Election in town of 400 to 500 population.—Whenever the boundary lines of one or more of the counties of this State shall lie within the corporate lines of any town or city having a population of not less than four hundred or more than five hundred inhabitants, according to the census of 1920 or any future census, and it is desired to change the county lines and bring the said town or city wholly within the limits of one county only; the change of such county lines shall be effected in the following manner:

Whenever a petition, signed by not less than thirty qualified voters of said town or city shall be addressed to the governing authorities of said town or city asking that an election shall be held as in this Act prescribed, provided that there shall be not less than fifteen petitioners from each of the counties whose boundary lines lie within the corporate limits of said town or city, and said petition be approved by a majority of the members of the governing board of said town or city, it shall be the duty of said governing authorities to submit the matter, as herein provided, to the lawful voters of said municipality at any general election therein, or at any special election held for that purpose, after advertising the same in either case once a week for four weeks in the public gazette in which sheriff's advertisements are published in each of the counties whose boundary lines lie within the limits of said municipality, and also in the public gazette in said municipality if there be one published therein. Said special election shall not be held earlier than thirty days after the publication of first notice, and shall be held under the same rules and regulations as provided for the election of members of the General Assembly. At any such general or special election, the question shall be submitted in such manner as to enable each voter to say whether he desires a change in existing boundary lines so as to bring the municipality wholly within the line of one of the adjacent counties, and which of the adjacent counties he desires the municipality to be included within. Whenever at such general or special election, a majority of the votes cast shall be in favor of changing the county lines so as to bring the municipality wholly within the line of one of the adjacent counties, and a majority of the votes cast shall be in favor of one of said adjacent counties, the mayor and clerk of said town or city shall within thirty days certify and declare the result of said election to the ordinaries or board of county commissioners or other officers having the control of the county business in each of the county [counties] affected. The said municipal and county authorities shall thereupon proceed to readjust and change the lines of the counties affected, in such manner as to include the said municipality wholly within the limits of the particular county fixed upon by said election, and shall cause a description and map of the new line to be filed and recorded in the office of the clerks of the Superior Courts of each county affected, and shall cause an official notice of the change and description to be published once a week for four weeks in a public gazette in their respective counties; and thereupon the new line or lines shall be held to be established in lieu of the original line or lines. The costs of said proceedings

shall be paid by the said town or city desiring the same. Acts 1927, p. 209.

Section Unconstitutional. — This section is unconstitutional and void, because in conflict with a general law found in §§ 468 et seq. The constitution forbids enactment of any special law where provision has been made for the same subject matter by general law. See § 6391. *Mayor v. Wilkinson County*, 166 Ga. 460, 143 S. E. 769.

CHAPTER 6

Change of County-Sites; Courts, Where Held; Offices, Where Kept.

§ 486. Application for change, how made.

General Assembly Not Bound by Findings of Secretary of State. — The General Assembly, in determining the facts and legislating upon the removal of county-sites under this and the following section, is not bound by the findings of the Secretary of State as to the result of the election. *Cowart v. Manry*, 166 Ga. 612, 144 S. E. 21; citing *Bachlott v. Buie*, 158 Ga. 705 (2) 124 S. E. 339.

Failure of General Assembly to Legislate.—Where removal election was held on May 5, 1927, and the General Assembly of 1927 did not pass any legislation thereon, the General Assembly of 1929 had the constitutional power and authority to pass an act removing the county-site. *Cowart v. Manry*, 166 Ga. 512, 144 S. E. 21.

CHAPTER 7

County Revenue

ARTICLE 1 From Taxation

SECTION 1

Special and Extra Tax

§ 504. (§ 395.) Extra tax, how levied.

Public Improvements.—The object stated in paragraph 2 of section 513, although for a county purpose, is held not to be within the purview of section 508; consequently, a tax "to build or repair courthouses or jails, bridges or ferries, or other public improvements, according to contract" does not require the recommendation of a grand jury. *Seaboard Air Line R. Co. v. Wright*, 34 Ga. App. 88, 90, 128 S. E. 234. See note of this case under § 507.

Cited in *Central of Georgia Ry. Co. v. Wright*, 165 Ga. 631, 142 S. E. 292.

§ 505. On failure to levy an extra tax.

An amendment could not be considered either as reducing the amount originally levied to pay the legal indebtedness nor as an admission by the county that the lesser amount mentioned in the amendment was all that was necessary to be levied for that purpose, and therefore as establishing that the levy was exorbitant to the extent of such attempted reduction. *Seaboard Air-Line Ry. Co. v. McIntosh County*, 38 Ga. App. 43, 142 S. E. 699.

Where the taxpayers in general had paid their taxes for the year and executions had been issued against those who had been defaulted in the payment of the same, including the plaintiff in error, and where, after a levy upon its property, the plaintiff in error filed an affidavit of illegality, it was not then lawful for the county authorities to amend the tax levy by reducing the amount

levied to pay the legal indebtedness of the county, as indicated above, and by adding the equivalent of such reduction to the amount levied for a separate and distinct purpose; and the court, upon the trial of the issue formed by the affidavit of illegality, properly disregarded such attempted amendment of the tax levy. *Ala. Great So. R. Co. v. Wright*, 34 Ga. App. 639, 130 S. E. 918; *Seaboard Air-Line Ry. Co. v. McIntosh County*, 38 Ga. App. 43, 142 S. E. 699.

§ 507. (§ 398.) Tax not sufficient.

See notes to § 696.

Gives County Four Years.—This section clearly provides that the county under certain contingencies may have four years in which to pay its accumulated debt. *Central, etc., R. Co. v. Wright*, 35 Ga. App. 144, 153, 132 S. E. 449.

Nature of Tax.—See *Seaboard Air-Line R. Co. v. Wright*, 34 Ga. App. 88, 90, 128 S. E. 234, which contains the same holding set out under this catchline in the Georgia Code of 1926.

Same—Editor's Note.—The question as to the amount of the tax which the county authorities can levy under this section to pay current expenses seems to be at present somewhat in doubt. By the holding in *Southwestern R. Co. v. Wright*, 156 Ga. 1, 118 S. E. 552 and *Central of Ga. R. Co. v. Wright*, 156 Ga. 13, 118 S. E. 709 the authorities may legally levy a tax not exceeding 100 per cent of the state tax to pay accumulated debts or current expenses or either. This is by virtue of this section. However in *Seaboard Air Line v. Wright*, 161 Ga. 136, 129 S. E. 646, it was held that the levy of a tax for the purposes specified in section 508 cannot exceed 50 per cent of the state tax and that this limit extends to current expenses. This decision seems in direct conflict with the holding in the two cases, supra, but the court did not refer to them. The same question arose in *Central, etc. R. Co. v. Wright*, 36 Ga. App. 386, 137 S. E. 93 and the Court of Appeals after considering both cases declined to follow the *Seaboard Case*, supra, and upheld the power to levy the 100 per cent tax.

In considering *Central, etc., R. Co. v. Wright*, 36 Ga. App. 386, 137 S. E. 93, it should be noted that in this case certiorari was granted by the Supreme Court and also that there is another case between the same parties and involving the same point before that court at the present time.

"Current Expenses."—It may be said generally that "current expenses" include the ordinary expenses of the county arising during the year for which the tax is levied, and "county purposes" include all purposes for which county taxation may be levied; that is, the ordinary expenses of the county and the unusual and extraordinary expenses as well. *Seaboard Air-Line R. Co. v. Wright*, 34 Ga. App. 88, 90, 128 S. E. 234. This case also adopts the holding set out in the first and second paragraphs under this catchline in the Georgia Code of 1926.

This section does not expressly or impliedly authorize the levy of a tax for current expenses in any amount. *Atlantic, etc., R. Co. v. Long County*, 167 Ga. 210, 212, 144 S. E. 783.

The term "current expenses," as employed in this section is necessarily included in the term "for county purposes" as employed in § 508. *Atlantic, etc., R. Co. v. Long County*, 167 Ga. 210, 212, 144 S. E. 783.

"Extra," extraordinary, or special taxes, no matter which term is used to denominate the taxes not essentially necessary for carrying on the ordinary functions of government, are not to be computed in the consideration of the question whether a tax levy is excessive when the term "current expenses" as used in this section is involved. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890.

Tax laws passed since the adoption of the Code, to raise revenues for specific purposes definitely stated therein, are extra or special taxes, not coming within the provisions of this and the following section. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890.

A county can not legally levy a tax of more than 150 per cent, of the State tax to pay current expenses and accumulated debts. Accordingly, where a county levied a tax of 8¼ mills for the combined purpose of paying current expenses and accumulated debts, the levy was excessive to the extent of three fourths of one mill. *Atlantic Coast Line Railroad Co. v. Long County*, 39 Ga. App. 303, 147 S. E. 158.

Recommendation of Grand Jury Not Necessary.—Under this section, the proper county authorities may, without a recommendation of the grand jury, levy a tax upon the taxable property of the county, in an amount equal to 100 per cent. of the State tax for the current year. *Wright v. Central of Georgia Ry. Co.*, 36 Ga. App. 382, 137 S. E.

93; *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 631. It follows therefore that a tax levy of \$2.75 per thousand made by the county authorities, without a recommendation of a grand jury, for the purpose of paying the accumulated indebtedness of the county, is legal, being within 100 per cent. of the State tax for the current year, which is \$5 per thousand. *Central of Ga. Ry. Co. v. Jones County*, 37 Ga. App. 763, 142 S. E. 301.

A county may levy more than 100 per cent. of the State tax, without the recommendation of a grand jury, for the payment of accumulated debts, "when debts have accumulated against the county, so that one hundred per cent. on the State tax, or the amount specially allowed by local law, can not pay the current expenses of the county and the debt in one year." This section of the Civil Code is not to be construed to limit the power thereby conferred so as to impose only an additional levy of 50 per cent. of the State tax in case it should be necessary to levy the 50 per cent. of the State tax under the provisions of section 508 of the Code. Hill, J., concurs specifically as to this note. *Central of Ga. R. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890.

If the levy of 50 per cent. of the State tax, as authorized by section 508, is exhausted, and under the terms mentioned in section 507 the levy of an additional 100 per cent. on the State tax is insufficient to pay the current expenses for the year and the accumulated debts in one year, then the county authorities without the recommendation of a grand jury, for the purpose of paying the indebtedness of the county, may levy an additional assessment for the purpose of paying its accumulated debts and current expenses, unless the latter have been included in the levy for county purposes or otherwise provided for. This item of the levy must be sufficient to pay off the accumulated debts of the county in four years. Unpaid lawful current expenses incurred in one year, which were not discharged by payment and for which county warrants were legally issued, are accumulated debts of the county falling within the provisions of paragraph 1 of section 513 of the Code. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890.

The tax under section 508 of the Civil Code of 1910, not to exceed fifty per cent. of the State tax, is one over and above the extra or special taxes authorized by sections 504, 506, 507, and is in addition to such extra or special taxes, and is leviable for county purposes, including payment of the legal indebtedness of the county due or to become due during the year, or past due, the current expenses of the county, and the other purposes stated in section 513. When the tax levied under section 508, and to the limit therein fixed, for the purposes of paying the legal indebtedness and current expenses of the county, is insufficient for those purposes, then resort can be had to the extra tax authorized under section 507, to pay accumulated debts and current expenses, or either. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 631, 142 S. E. 292.

Cited in *Maddox v. Anchor Duck Mills*, 167 Ga. 695, 700, 146 S. E. 551; *Decatur Bank & Trust Co. v. American Sav. Bank*, 166 Ga. 789, 144 S. E. 235; *Blue Island State Bank v. McRae*, 165 Ga. 153, 140 S. E. 351; *Central of Georgia Ry. Co. v. Effingham County*, 37 Ga. App. 766, 801, 142 S. E. 303; *Southern Ry. Co. v. Wright*, 36 Ga. App. 391, 137 S. E. 98.

SECTION 3

Purposes for Which County Tax May Be Assessed

§ 508 (§ 399). Tax for county purposes.

County Purposes.—See note "Current Expenses" under section 507. See, also, note under section 504.

Same—Includes Current Expenses.—The levy of a tax for the purposes specified in this section can not exceed fifty per cent of the State tax. This limit extends to current expenses. *Seaboard Air-Line R. Co. v. Wright*, 161 Ga. 136, 129 S. E. 646.

Items Not Included.—In computing the fifty per cent provided by section 508 of the Code, items of tax levy which require no recommendation by the grand jury are not to be considered in determining the 50 per cent referred to in that section. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 623, 142 S. E. 288.

Same—Tax to Pay Accumulated Debts.—While section

507 does not expressly authorize a levy of a tax for 100 per cent of the State tax to pay accumulated debts and current expenses, it does by clear and necessary implication authorize such a tax. This section authorizes the proper county authorities to levy a tax to pay current expenses. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 631, 142 S. E. 292.

Counties are expressly authorized to levy a tax for the payment of past-due or accumulated debts of the county; and where a warrant was issued for a past-due or accumulated debt, and in renewal of a former warrant which had been issued in a previous year for a liability incurred during that year, and payment of which had gone by default, such renewal warrant was not void because it was given in one year to be paid in the following year. *Blue Island State Bank v. McRae*, 165 Ga. 153, 140 S. E. 351.

Applied in *McGinnis v. McKinnon*, 165 Ga. 713, 141 S. E. 910.

Cited in *Central of Georgia Ry. Co. v. Effingham County*, 37 Ga. App. 766, 801, 142 S. E. 303; *Central of Georgia Ry. Co. v. Jones County*, 37 Ga. App. 763, 142 S. E. 301; *Atlantic Coast Line R. Co. v. Long County*, 167 Ga. 210, 144 S. E. 783; *Central of Georgia Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890.

§ 509. (§ 400). Duty of ordinary.

Provisions Directory.—Failure to comply with the provisions of this section of the Code, which require the ordinaries to have prepared and presented to the grand jury on the first day of the court, for inspection by that body, a statement of the financial condition of the county and the amount of tax required to pay the county's liabilities, does not affect the validity of the tax levy. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 623, 142 S. E. 288, citing *Atlanta National Asso. v. Stewart*, 109 Ga. 80, 35 S. E. 73.

§ 513. (§ 404). Objects of county tax.—County taxes shall be assessed for the following purposes:

1. To pay the legal indebtedness of the county due, or to become due during the year, or past due.

2. To build or repair court-houses or jails, bridges or ferries, or other public improvements according to the contract; provided, that in counties having a population of not less than 11,813 and not more than 11,825 persons, according to the 1920 Census of the United States, the combined or total tax levy for all the purposes enumerated in this or subsection 2 shall not exceed five (5) mills, unless the grand jury at the spring term of the Superior Court for such county shall recommend an increase for such year to meet some emergency.

3. To pay sheriffs', jailors', or other officers' fees that they may be legally entitled to, out of the county.

4. To pay coroners all fees that may be due them by the county for holding inquests.

5. To pay the expenses of the county, for bailiffs at courts, non-resident witnesses in criminal cases, fuel, servant hire, stationery, and the like.

6. To pay jurors a per diem compensation.

7. To pay expenses incurred in supporting the poor of the county, and as otherwise prescribed by this Code.

8. To pay charges for educational purposes, to be levied only in strict compliance with the law.

9. To pay any other lawful charge against the county. Acts 1929, p. 154, § 1.

See notes to §§ 507, 508, 1551(130).

In General.—Under the provisions of this section, county taxes shall be assessed to pay the legal indebtedness of the county, due, or to become due during the year, or past due; and when debts have accumulated against the county, so that 100 per cent on the State tax, or the amount specially allowed by local law, can not pay the current expenses of the county and the debt in one year, the proper

county authorities may in their discretion levy such an amount or per cent of tax upon the taxable property of the county as will insure the payment of the debt or debts of the county within at least four years, and such a per cent as will at the same time provide for the current expenses and thereby prevent, if possible, an increase of indebtedness or the creation of additional obligations. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 623, 142 S. E. 288.

Where an item of a tax levy under this section is indefinite but not void, it may be clarified and made definite by an amendment which does not change the purpose or the amount of the original levy; and this is true even though the generality of taxpayers have paid their taxes and the amendment is made after the property of a protesting taxpayer has been levied on under a tax *fi. fa.*, and an affidavit of illegality has been interposed to the levy. *Southern Ry. Co. v. Whitfield County*, 38 Ga. App. 703, 145 S. E. 668.

It is sufficient if each item of a tax levy under section 513 of the Civil Code of 1910 gives the per cent of the tax levied under that item, and it is not necessary that the per cent levied for each separate purpose expressed in the item be stated. *Southern Ry. Co. v. Whitfield County*, 38 Ga. App. 703, 145 S. E. 668.

This section names nine purposes for which taxes may be levied, and when a tax is levied for any one of these nine purposes it includes all items named in that purpose. *Central, etc., R. Co. v. Wright*, 35 Ga. App. 144, 132 S. E. 449.

Paragraph 1.—Accumulated Indebtedness.—Under the terms “due” and “past due” is embraced, necessarily, the “accumulated indebtedness” of the county. Indebtedness of the county “due” or “past due” may possibly be more extensive, in the last analysis of those expressions, than “accumulated indebtedness,” but “accumulated indebtedness” can not be more extensive than the aggregate of the indebtedness which is due and that which is past due. And consequently a tax for the purpose of paying “accumulated indebtedness” is provided for exclusively under this section. *Central, etc., R. Co. v. Wright*, 35 Ga. App. 144, 153, 132 S. E. 449.

And it follows that a tax for the purpose of paying accumulated indebtedness, as allowed under section 507, can not be lawfully levied under item 9 of section 513, which authorizes a levy “to pay any other lawful charge against the county.” *Central of Ga. R. Co. v. Wright*, 35 Ga. App. 144, 153, 132 S. E. 449.

Paragraph 2.—See notes to §§ 504, 507.

Cited in *Maddox v. Anchor Duck Mills*, 167 Ga. 695, 700, 146 S. E. 551; *Blue Island State Bank v. McRae*, 165 Ga. 153, 140 S. E. 351; *McGinnis v. McKinnon*, 165 Ga. 713, 141 S. E. 910; *Central of Georgia Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890; *McIntosh County v. Seaboard Air Line Ry. Co.*, 38 Ga. App. 611, 144 S. E. 687; *Seaboard Air Line Ry. Co. v. Liberty County*, 39 Ga. App. 75, 146 S. E. 771; *Central of Georgia Ry. Co. v. Wright*, 165 Ga. 631, 142 S. E. 292.

§§ 513(a)-513(c). Park's Code.

See P. C. §§ 1236(1)-1236(3).

SECTION 4

Assessment and Collection of Taxes

§ 514. (§ 405). Order must specify.

See notes to § 696.

Cited in *Seaboard Air Line Ry. Co. v. Liberty County*, 39 Ga. App. 75, 146 S. E. 771; *Southern Ry. Co. v. Whitfield County*, 38 Ga. App. 703, 145 S. E. 668.

§ 521. (§ 412). Payment, how enforced.

Applied in *Payne v. Royal Indemnity Co.*, 168 Ga. 77, 78, 147 S. E. 95.

§ 523. (§ 414.) On failure to pay.

Execution against Sheriff.—An execution could not be legally issued under this section against the sheriff of a county on the bond given by the sheriff of a city court of the county, although both offices may have been filled by

the same individual. *Martin v. Decatur County*, 34 Ga. App. 816, 131 S. E. 302.

Cited in *Wilcox County v. American Surety Co.*, 164 Ga. 798, 139 S. E. 538; *Payne v. Royal Indemnity Co.*, 168 Ga. 77, 147 S. E. 95.

§ 526. (§ 417.) County tax may be remitted.

As to when claims against county are barred, see section 411 and note.

Cited in *Atlantic Coast Line R. Co. v. Mitchell County*, 35 Ga. App. 47, 135 S. E. 223.

SECTION 4A

Fiscal Year in Certain Counties

§ 526(4). May change to calendar year.—Any county or counties, the fiscal year of which has been changed or shall be changed to cover a different period of time than the calendar year, shall have full power and authority, by order of the ordinary, board of commissioners or other authority having charge of the fiscal and administrative affairs of any such county, which order shall be entered upon their minutes at the time, to change said fiscal year to the calendar year. Acts 1929, p. 235, § 2.

Editor's Note.—The acts of 1922 and 1925, codified as §§ 526(1)-526(3) of the code of 1926 were amended by adding the provisions of this act, herein codified as §§ 526(4)-526(6).

§ 526(5). Power to levy tax. — Any county changing its fiscal year to the calendar year shall have full power and authority to levy a tax during the calendar year in which such change is made, covering the entire calendar year, notwithstanding a tax may have previously been levied and collected for a portion of such calendar year and notwithstanding any statute of this State to the contrary. Acts 1929, p. 235, § 3.

§ 526(6). Change to other than calendar year.—Any county within the terms of this Act shall have full power and authority to change to a fiscal year other than calendar year, and from such fiscal year back to calendar year as a fiscal year, without limit as to the number of changes. Acts 1929, p. 236, § 4.

SECTION 5

Proceedings against Defaulting Tax-Collectors and Treasurers

§ 528. (§ 419.) Failure to account, malpractice.

Applied in *Pitts Banking Co. v. Sherman*, 166 Ga. 495, 143 S. E. 581.

ARTICLE 2

From Other Sources

§ 530. (§ 421.) Licenses, exhibitions, etc.

Test for Local Ordinance.—In determining whether the

occupation tax imposed by a local ordinance upon peddlers is reasonable, the courts should take into consideration the occupation taxes imposed by this section. *Landham v. La-Grange*, 163 Ga. 570, 576, 136 S. E. 514.

ARTICLE 4

Paupers

§ 554. (§ 439.) Parents and children bound to support each other.

When Mother Must Support Children.—On the death of a father the duty of supporting the children devolves upon the mother, where the mother has the ability, and the infant child is without means, and is unable to earn a maintenance. *Thompson v. Georgia R., etc., Co.*, 163 Ga. 598, 603, 136 S. E. 895.

§§ 563(1)-563(13). Park's Code.

See P. C. §§ 1519(44)-1519(55).

CHAPTER 9

County Officers

ARTICLE 1

County Treasurer

SECTION 4

County Orders

§ 579. (§ 463). Order in which the county debts are paid.

Cited in *Maddox v. Anchor Duck Mills*, 167 Ga. 695, 702, 146 S. E. 551.

SECTION 6

Final Settlements, Fees, Expenses and Salaries

§ 590(2). Salary in county of 63,690 to 63,695 population.—The salary of the county treasurers of counties of this State, having a population according to the Federal Census of 1920 of not less than 63,690 and not more than 63,695, be fixed at thirty-six hundred (\$3,600.00) dollars per annum, to be paid in monthly installments of three hundred (\$300.00) dollars each out of county funds. Acts 1929, p. 223, § 1.

ARTICLE 2

County Surveyor and His Fees

SECTION 2

Duties and Fees of County Surveyor

§ 603. (§ 485). Where there is no surveyor.

See notes to § 3818.

§§ 615(a)-615(b). Park's Code.

See § 6017(1).

§§ 615(f)-615(j). Park's Code.

See §§ 6017(6)-6017(8).

§ 615(m). Park's Code.

See § 6017(11).

CHAPTER 9A

County Manager Form of Government

§ 615 (24). Uniform county manager form of government provided; operation of act.—This act shall be a general law to provide a uniform county commissioner's law for all such counties in this State as may require a commission form of county government composed of a board of county commissioners of roads and revenues for such county, with a county manager as the chief executive officer thereof, to be known as the county-manager form of government, and shall not prevent any county in this State from having a county commissioner's form of county government by local Act as now provided by law, provided such local Act shall not provide a county-manager form of government for such county; and this Act shall not go into effect in any county of this State except upon a majority vote of the qualified voters of the county, and the operation of this Act in any county adopting the same shall be suspended and terminated in like manner upon a majority vote of the qualified voters of the county; and upon the suspension of the operation of this Act in any county, the local Act of force in such county shall automatically be revived and shall have full force and effect in such county, as if its operation had not been suspended in such county by the adoption of this Act by such county; provided, however, that this provision shall not affect a county in this State having a population of 44,051 by the 1920 census taken by the United States government, and this Act shall go into force and effect in a county of this State having a population of 44,051 by the 1920 census taken by the United States government, and the operation of this Act in such county adopting the same shall be suspended and terminated only upon an election called for the purpose of submitting to the qualified voters of the county the question whether the county-manager form of county government shall be established or abolished in such county as provided in this Act. If a majority of the qualified voters of such county, voting in such election, shall vote in favor of establishing the county-manager form of county government in and for such county, this Act shall thereupon become of full force and effect in such county; and if a majority of the qualified voters of such county voting in such election shall vote in favor of abolishing the county-manager form of county government in such county, such form of county government shall thereupon be suspended and terminated in such county; and upon the suspension of the operation of this Act in such county, the local Act of

force in such county shall automatically be revived and shall have full force and effect in such county as if its operation had not been suspended in such county by the adoption of this Act by such county; provided, however, that the members of the board of commissioners of such county, in office under the provisions of this Act at the time of the suspension of the operation of this Act in such county, shall hold office and act as the commissioners of such county under the provisions of such local Act of such county until the expiration or their respective terms of office under the provisions of this Act, and until their successors shall be elected and qualified under the provisions of such Act for such county; provided, further, that the operation of this Act in any county of this State shall not be suspended and terminated by any election held within two full years after this Act shall be put into effect in such county. If the ordinary of the county shall be in charge of the affairs of such county at the time of the adoption of this Act in such county, the ordinary shall take charge of the affairs of such county upon the supervision of the operation of this Act in such county, as now provided by law for counties having no county commissioners. Acts 1922, pp. 83, 93, 94; 1927, p. 211.

Editor's Note.—The first proviso and all the provisions that follow it down to the second proviso, were inserted by the amendment of 1927.

CHAPTER 11

Commissioners of Roads and Revenues

§ 626(2). Salaries of commissioners in counties of 200,000 population.—The compensation of commissioners of roads and revenues in counties in this State having a population of two hundred thousand or more, according to the United States census of 1920 or any future census, be and the same is hereby fixed at the sum of three hundred (\$300.00) dollars per month for each commissioner, payable monthly on the first day of each month, out of the county treasury. Acts 1929, p. 218, § 1.

CHAPTER 12

Roads, Bridges, Ferries, Turnpikes, Causeways, Crossings, etc.

ARTICLE 1

Public Roads

SECTION 1

Classification of Roads and Districts

§ 629(a). Park's Code.

See § 629(1).

§ 629 (1). Post roads deemed public roads; maintenance.

Effect upon Classification of Roads.—This section does not prohibit the county authorities from classifying the road as a first, second, or third-class road as provided by law. *Browne v. Benson*, 163 Ga. 707, 137 S. E. 626. See section 631.

§ 631. (§ 511). Roads may be classified.

The road commissioners mentioned in this section are provided for in section 724. *Browne v. Benson*, 163 Ga. 707, 137 S. E. 626.

Effect of Section 694.—The provision of this section, with regard to "concurrence of the majority of the road commissioners" (such commissioners as are provided in section 724), is inconsistent with the exclusive power granted to county commissioners of roads and revenues in section 694 et seq. This ruling is based upon the theory that the provision for "concurrence of the majority of road commissioners," found in section 631, also applies to the establishment of third-class roads. In fact section 633, codified from Ga. Laws 1894, p. 100, does not mention road "commissioners." The act did authorize classification of third-class roads. *Buchanan v. James*, 130 Ga. 546, at page 549. The act merely amends the road laws so as to provide for third-class roads and how such roads shall be worked. Section 724 provides for district road commissioners, and their duties are specified in section 729. All of these duties, where the alternative road law is operative, are reposed solely in the county board of roads and revenues. *Browne v. Benson*, 163, Ga. 707, 137 S. E. 626.

§ 633. (§ 513). Third-class roads.

See note under section 631.

§ 634. (§ 514). Bridges and causeways.

This section imposes no legal duty upon a county to maintain at a width of 16 feet a traveled way for vehicles over a bridge which is 32 feet long, on a highway in this State. *Smith v. Colquitt County*, 37 Ga. App. 222, 223, 139 S. E. 682. See note to § 748.

SECTION 3

Roads; How Laid Out, Altered, or Discontinued

§ 640. (§ 520). Public roads, how laid out or altered.

See notes to §§ 686 and 5243.

Res Adjudicata.—Where, on a proceeding under this section to open a road, a landowner who interposed his claim for \$2500 as damages was awarded but \$250 by the jury, and thereafter, instead of having that award reviewed by certiorari, he brought a suit in the superior court to recover of the county \$3000 as damages for taking part of his land and decreasing the market value of the part not taken, a plea of res adjudicata in defense to that suit was properly sustained. *Love v. Murray County*, 37 Ga. App. 604, 141 S. E. 85.

Method Not Exclusive as to Establishing.—It has several times been ruled that sections 640 et seq., is a general law, providing a method of establishing roads. It is not the only method, but is cumulative, and it has also been held that the establishment of a public road without compliance with sections 640 et seq. is illegal. *Shore v. Banks County*, 162 Ga. 185, 132 S. E. 753, citing numerous cases.

Does Not Apply to Question of Classification.—This section applies to "any new road, or alteration in an old road," but has no application to the question of whether county commissioners alone have authority to classify public roads into first, second, and third-class as provided in section 631. *Browne v. Benson*, 163 Ga. 707, 137 S. E. 626. See note to sec. 621.

Adoption of Alternative Road Law.—When the alternative road law is adopted by the recommendation of the grand jury, road commissioners cease to exist in that county, and an exercise of any judicial functions whatever by those persons who may previously have been road commissioners be-

comes legally impossible. *Varner v. Thompson*, 3 Ga. App. 415, 60 S. E. 216. *Browne v. Benson*, 163 Ga. 707, 137 S. E. 626.

State Highway Department Cannot Proceed Hereunder.—This section provides a method applicable alone for the condemnation of rights of way for public roads to be laid out by the proper county authorities and the state highway department cannot proceed by virtue of this section to condemn rights of way for State-aid roads. *McCallum v. McCallum*, 162 Ga. 84, 132 S. E. 755.

Who May Be Appointed Commissioners.—*Anderson v. Howard*, 34 Ga. App. 292, 129 S. E. 567, following *Brown v. Sams*, 119 Ga. 22, 45 S. E. 719, as set out in first paragraph under this catchline in the Georgia Code of 1926.

Same—Presumptions of Validity.—In the absence of anything to the contrary, the presumption would be that the appointment was properly made. *Anderson v. Howard*, 34 Ga. App. 292, 129 S. E. 567.

Description of Road.—Where it was objected that the road commissioners, or reviewers, did not physically "mark out" the road as required by this section, and the evidence was that they did not actually stake or mark out the road on the ground, or designate its location in any other way except on paper, but they did attach to and make a part of their report a map or plat containing all the information and data necessary for the definite location of the proposed road, this was held a sufficient compliance. *Anderson v. Howard*, 34 Ga. App. 292, 129 S. E. 567.

Cited in *Parrish v. Glynn County*, 167 Ga. 149, 144 S. E. 785.

§ 642. (§ 522). Persons in possession to be notified.

Notice Signed by Majority Sufficient.—It is not necessary that the notice served on the objectors should be signed by all the commissioners. A majority is sufficient. *Anderson v. Howard*, 34 Ga. App. 292, 129 S. E. 567.

Clerical Error in Notice.—The words in a notice, "said road to be fifty feet in length," clearly appeared to be a clerical error, and, the length of the road otherwise appearing therein, it was proper to overrule a motion to dismiss the proceeding, based on the ground that the notice showed that the road was to be only fifty feet long, and for that reason could not be of public utility. *Anderson v. Howard*, 34 Ga. App. 292, 129 S. E. 567.

Failure to Serve All Parties.—Where the citation was published as required by sec. 641, a plaintiff cannot object to the proceedings on the ground that certain other persons, through whose land the road would pass, had not been served with written notice as required by this section. *Anderson v. Howard*, 34 Ga. App. 292, 129 S. E. 567.

SECTION 9

Damages, How Assessed

§ 678. (§ 557). Landowners aggrieved, how redressed.

Meaning of "Vicinage."—The word "vicinage," in this section means the neighborhood, or surrounding or adjoining district; and its extent does not depend upon an arbitrary rule of distance or topography, but varies according to the sparseness or density of settlement in county or city districts. *Graves v. Colquitt County*, 34 Ga. App. 271, 129 S. E. 166.

See notes to § 640.

§ 686. (§ 565). Certiorari.

Review of Damage.—Certiorari proper to review judgment based on award of damages under §§ 640 et seq. *Love v. Murray County*, 37 Ga. App. 604, 605, 141 S. E. 85.

§ 688. (§ 567). Value of land, how ascertained.

This section does not mean that in estimating the value of the land so taken the jury could take into consideration the losses arising from the operation of a ferry of the owners, due to competition springing from the use of this bridge by the traveling public. *State Highway Board v. Willcox*, 168 Ga. 883, 893, 149 S. E. 182.

ARTICLE 2

Alternative Road Law

§ 694. (§ 573). County authorities to lay out roads.

Does Not Include Roads Inside of Cities.—The word "road," wherever used in these sections, seems clearly to indicate that roads lying outside the municipalities only are included in the term itself. Especially is this true when sections 695 and 696 are considered; for the residents of cities are not affected by the provisions of section 695, declaring who shall be subject to road duty, nor are they subject to the payment of the commutation tax provided for in section 696. *Mitchell County v. Cochran*, 162 Ga. 810, 817, 134 S. E. 768.

Classification under Alternative Road Law.—The alternative road law having been adopted in Muscogee County, the commissioners of roads and revenues of that county had the exclusive right to classify the roads of that county at any time, in their discretion. *Browne v. Benson*, 163 Ga. 707, 137 S. E. 626. See in connection with classification of roads section 631 and notes.

Only One Levy.—A county, after having adopted the alternative road law as embodied in this article, and after having levied the maximum rate of four dollars per thousand for the maintenance of the public roads of the county, can not levy an additional or special tax for that purpose. *Central of Georgia Railway Co. v. Terrell County*, 37 Ga. App. 599, 141 S. E. 79.

§ 695(3). Tax in counties of population between 26,815 and 26,830.—In all counties of this State, having a population of not less than 26,815 and not more than 26,830 according to the census of 1920, the county commissioners of such counties are hereby authorized and permitted to levy a road-maintenance tax of not more than \$4.00 per annum upon all persons subject to road duty of commutation tax under Code section 695 of the Code of 1910.

That such road-maintenance tax shall be in lieu of the road duty or commutation tax defined in section 695, supra. And said road-maintenance tax shall be collected by the county tax-collector as other taxes are collected, and the lien for such taxes to be equal to other tax liens.

The justice of the peace in each militia district in such county shall make and furnish to the tax-receiver of the county a list of every person residing in his militia district who is subject to said tax. Said list to be furnished annually not later than June 10th of each year. Said justice of the peace to receive, as compensation for his services, ten cents for each name furnished. Said sum to be paid out of the county treasury.

It shall be the duty of the tax-receivers to return those subject to said tax to the tax-collector of the county, whose duty it shall be to collect said road-maintenance tax as other taxes are collected. Acts of 1929, p. 155, § 1.

§ 696. County tax for roads.

In Addition to Levy under § 507.—The tax authorized under this section may be levied over and above and in addition to the tax levies authorized under sections 507, 508, and 510 and is not limited by the provisions of these latter sections. *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890; *Central of Ga. Ry. Co. v. Jones County*, 37 Ga. App. 763, 142 S. E. 301.

Whether Tax Sufficiently Specific.—A tax levy by a county of "\$2.00 per thousand * * for county purposes, as provided in this section" is, by reference to the code section, sufficiently specific, even assuming that the provisions of section 514 of the Political Code, which provides for specialness in county tax levies, applies to the levy of the special tax provided for under section 696 of the

Political Code of 1910. *Central of Ga. Ry. Co. v. Jones County*, 37 Ga. App. 763, 142 S. E. 301.

Cited in *McGinnis v. McKinnon*, 165 Ga. 713, 141 S. E. 910.

§ 704(2). **General road law amended to except counties of 11,755 population.**—The Act of 1891, known as the general road law, on pages 135, 136, 137, and 138 of the Acts of 1891, and the amendments thereto, shall be amended by adding another section thereto, as follows:

Nothing contained in this Act shall apply to counties having a population of 11,755, but that in those counties the road tax shall be collected by the tax-collector, as other State and County taxes are collected. Acts 1929, p. 323, § 1.

ARTICLE 5

Road Duty and Commutation Tax in Certain Counties

§ 723(1). **Exemption from road duty in counties of 13,600 to 14,300 population.**—In counties of this State having a population of not less than 13,600 and not more than 14,300, according to the official census of the United States for 1920 or any future census, no citizen of any such county shall be required or compelled to do or perform any work, service, or duty upon the public roads or bridges of any such county in building, repairing, or maintaining the public roads or bridges of such county; nor shall any citizen of such county be required or compelled to pay any sum whatever in commutation of any such work, service, or duty. Acts 1929, p. 322, § 1.

ARTICLE 6

Commissioners of Public Roads

SECTION 1

Appointment and Obligation to Serve

§ 724. (§ 584). **Three commissioners for each district, two may act.**

See sec. 631 and notes thereto.

ARTICLE 8

Bridges, Ferries, Turnpikes and Causeways.

SECTION 3

Contractor's Liability and Bond

§ 748. (§ 603). **Condition of contractor's bond.**

Narrow Bridge.—Since, under this section, a county is

liable to travelers over bridges along the highways only for injuries caused from defective bridges, the county is not negligent, as respects a vehicular traveler over a bridge, in maintaining the bridge so narrowly constructed that an approaching vehicle will run into him while attempting to pass him on the bridge. *Smith v. Colquitt County*, 37 Ga. App. 222, 225, 139 S. E. 682. See note to § 634.

Since a county is not liable to a traveler on a highway for injuries to him resulting from a defect in the roadway, but is liable to him only for injuries resulting from defects in bridges on the highway, as provided in this section, the court, upon the trial of a suit against the county to recover damages because the automobile in which the plaintiff was traveling along the highway failed to take the bridge as a result of the road being wider than the bridge, and fell into the declivity on the side of the road at the entrance to the bridge, properly directed a verdict for the defendant. *Knight v. Floyd County*, 38 Ga. App. 515, 144 S. E. 348.

SECTION 7

Right of Way; Grants, How Construed

§ 781. (§ 636). **Value of land, how estimated.**

This section is not applicable where the State is seeking to take land for a right of way and for a bridge, and its prospective value as a bridge-site and its present value as a ferry, if one was in use, should be taken into calculation. This does not mean that the value of another ferry-site and profits arising from the operation of such ferry should be taken into consideration in determining the value of the bridge-site which the State is seeking to condemn. *State Highway Board v. Willcox*, 168 Ga. 883, 893, 149 S. E. 182.

ARTICLE 12

Private Ways

§ 808. (§ 662). **Not more than fifteen feet wide.**

See notes under §§ 819, 825.

§ 819. (§ 673). **Can not be closed after one year without notice.**

Way Need Not Be Established.—This section, properly construed, means that notwithstanding a road may not be a private way within the meaning of the law, yet if persons have used it—traveled it—for as long as a year as though it were such in fact, the owner can not obstruct or close it without first giving the prescribed notice. It is not the purpose of this section to enable the user of the road to hold the owner at bay until the road may become a private way by prescription, but its clear intent is that if the owner sits by and for a year or more permits another to travel a road over his land as though it were a private way, such conduct on his part speaks of a necessity for the way to the extent that the law will preserve the status for 30 days in order that the parties using the road may take steps to have it made permanent by condemnation. *Barnes v. Holcomb*, 35 Ga. App. 713, 716, 134 S. E. 628, citing *Neal v. Neal*, 122 Ga. 804, 50 S. E. 929.

Prescriptive Use Unnecessary.—The provisions of the present section were in the earlier codes, and, what is more, the article in which they appeared in each of such earlier codes was devoted exclusively to the acquisition of private ways by express grant and by condemnation. It is thus seen that the right defined in this section was not dependent upon such use as could ultimately have resulted in prescription. These facts regarding the history of this section apply equally to the history of section 808. *Barnes v. Holcomb*, 35 Ga. App. 713, 719, 134 S. E. 628.

Necessary Allegations.—An application to prevent closing a road until the thirty days notice is given will be sufficient to show the jurisdiction of the ordinary where it describes the road with reasonable certainty, and alleges that the road has been used by the applicant as a private way for as much as a year, and that the owner of the land over which it passes has obstructed or closed it without first

giving the 30-days notice in writing. In such a case it is not necessary to make the allegations required in an application for the removal of obstructions from a private way claimed by prescription under the provisions of section 824. *Barnes v. Holcomb*, 35 Ga. App. 713, 716, 134 S. E. 628.

See notes to § 825.

§ 825. (§ 679). Obstructions, how removed.

Where persons claiming a prescriptive right of way apply to the ordinary for the removal of obstructions from it, under this section, they must show not only that there has been an uninterrupted use of it for more than seven years, but that it is not more than fifteen feet wide, and that it has been kept open and in repair, and is the same fifteen feet originally appropriated. Under the facts of this case the ordinary erred in granting an order for the removal of obstructions. *Barnett v. Davis*, 38 Ga. App. 494, 144 S. E. 330.

§§ 828(uu-2)-828(uu-11) Park's Code.

See §§ 1770(50)-1770(56).

§§ 828(uu-16)-828(uu-49). Park's Code.

See §§ 1770(60a)-1770(60cc).

§ 828(xx). Park's Code.

See § 828(1).

§ 828(ooo)-828(ppp). Park's Code.

See §§ 828(18)-828(19).

§ 828(sss). Park's Code.

See § 828(22).

§§ 828(uuu)-828(www). Park's Code.

See §§ 828(27)-828(28).

§ 828(zzz). Park's Code.

See § 828(31).

§ 828(bbbb). Park's Code.

See § 828(33).

ARTICLE 13

State Highway Department. Reorganization.

SECTION 1

Reorganization, Assent to Federal Law and Membership of Department

§ 826 (1). State Highway Department reorganized.

As to construction through municipality without consent of local authorities, see note to sec. 828(31).

§ 828 (4). Suits by or against department.

In *Habersham County v. Cornwall*, 38 Ga. App. 419, 422, 144 S. E. 55, it is said: "By the act of 1925 (Ga. L. 1925, p. 208, 211) it is provided that the State Highway Department may be sued. This provision may or may not be applicable to the plaintiff's claim. Even if inapplicable, that, with-

out more, would not entitle the plaintiff to proceed against the county where the county is not otherwise liable."

SECTION 6

Powers and Duties of Highway Department

§ 828 (18). Control of road work, etc.

Effect of Section upon Rights to Condemn.—The provision that no road or portion thereof shall become a part of the system of State-aid roads until so designated by the State highway board does not prevent that board from instituting condemnation proceeding to acquire right-of-way. On the contrary, the law authorizes this proceeding. *Cook v. State Highway Board*, 162 Ga. 84, 97, 132 S. E. 902.

§ 828(19). Appointment of board, etc.; limit of total mileage; relocation, etc.—Provision 3. Efforts shall be made to serve as large a territory and as many market points as practicable with the said system, due consideration being given topographic and construction difficulties; provided that said State Highway Department shall take over the State-aid roads as above mentioned on or before January 1, 1922; and provided further, when the various counties have complied with the law with reference to right of way; and provided further, that the State Highway Department in taking over said roads is not bound to the right of way and road-bed as located on January 1, 1922, but shall have the right to resurvey and relocate in their entirety any one or all of said roads, keeping in view only the control points, and it shall be the duty of the county or counties when its resurveys and relocations are made to furnish the right of way, or relocation and resurvey, free of charge to the said Highway Department; provided, that in relocating any road or right of way the State Highway Department shall confer with the ordinary or county commissioners as the case may be, and give due consideration to their wishes, but in case of a disagreement the judgment of the State Highway Board shall prevail. That, from and after the passage of this Act, the State-aid roads in the State of Georgia are such roads as are indicated by the parallel white lines on the map of the State of Georgia, hereto attached and made a part of this bill, with the power and authority in the State Highway Board of the State of Georgia, from time to time, in its discretion, to designate an additional five hundred (500) miles of State-aid roads within the State of Georgia, between any points in said State, which within its discretion may require such State-aid roads, and such roads as are indicated by the two parallel white lines on the map of the State of Georgia, which is hereto attached, and by this enactment made a part of this bill, shall be the State-aid roads of the State of Georgia, without regard to the number of miles in said State-aid roads, until other State-aid mileage is added thereto by the State Highway Board of the State of Georgia, in its discretion, not to exceed five hundred (500) miles. Acts of 1929, p. 264, § 1.

Editor's Note.—As only Provision 3 of this section was amended by the act of 1929 the other portions of the section appearing in the Georgia Code of 1926 are not set out.

Amendment of 1922 Constitutional.—The act of August 21, 1922 (Acts 1922, p. 176), which authorizes the State High-

way Board to construct and maintain State-aid roads in and through towns or cities of not more than twenty-five hundred people, does not violate § 6391. *Jackson v. State Highway Department*, 164 Ga. 434, 138 S. E. 847.

Discretion of Board.—A court of equity will not interfere with the discretionary action of the State Highway Board acting under this section in designating and locating a State-aid road within the sphere of their legally delegated powers, unless such action is arbitrary and amounts to an abuse of discretion. *Jackson v. State Highway Department*, 164 Ga. 434, 138 S. E. 847, and *cit.*; *Town of Camak v. State Highway Board*, 166 Ga. 359, 143 S. E. 367; *Appleby v. Holder*, 166 Ga. 512, 143 S. E. 596.

Action for Unlawful Appropriation.—Without constitutional or statutory authorization, no action lies directly and primarily against the State Highway Board for unlawful appropriation of private property for road-construction purposes. *Edmonds v. State Highway Board*, 37 Ga. App. 812, 142 S. E. 214.

Limitation of 6300 Miles.—This limit of 6300 miles has not been extended expressly or impliedly by any action of the General Assembly. Amendment of 1922, authorizing the State Highway Board to construct and maintain State-aid roads through certain municipalities, in no manner affects the said mileage limit. *State Highway Department of Ga. v. Marks*, 167 Ga. 397, 145 S. E. 866.

Abandonment.—Refusal of an injunction against relocation of the road between Augusta and Waynesboro, and thereby substituting the "Peach Orchard Route" for the "McBean Route," was error; the evidence demanding a finding that the State Highway Department proposed to build a new interconnecting county-site road twenty-five or thirty miles long, and to abandon the existing interconnecting county-site road previously designated as such by the department, the construction and maintenance of which they had taken over for a number of years. *Marks v. Highway Department*, 167 Ga. 792, 146 S. E. 838.

§ 828(19a). Gas tax.—The counties in which lie such additional State-aid roads as are created by the amendment of 1929 to the preceding section shall not receive from the State of Georgia a proportionate part of the tax generally called the gas tax, for such additional mileage, until the rights of way for such additional State-aid mileage has been provided by the counties in which lie such additional mileage, and not until provision has been made by the State Highway Board for the construction of such additional mileage; and as each county furnishes the rights of way for such additional mileage and after provision for construction of such mileage has been made by the State Highway Department, then such county or counties shall be paid by the State of Georgia the proportionate amount of the gas tax for such additional mileage in said county or counties complying with the provisions of this Act. Acts of 1929, p. 265, § 2.

§ 828(19b). Roads to become part of State-Aid System.—Such roads as may have been constructed or upon which construction has or had begun with State, County and/or Federal Aid (whether included on said map or not), and also all of that mileage designated and adopted into the State-aid system by the State Highway Board and also those roads which were prepared and conditioned by the several county authorities, under contract or agreements with the Highway Board that said roads would be certified into the State-Aid System of Highways so that those roads prepared and conditioned for purpose of becoming part of State-Aid System of Highways shall rank equally with that mileage actually certified into the system under acts of General Assembly of 1925 (and as shown by the minutes of said board) after passage of that certain Act of the General Assembly of Georgia, approved Au-

ing over any additional mileage added by this Act; and the counties in which said roads are located shall be entitled to receive, from and after passage of this Act, their pro rata part of the one cent gasoline tax now allocated to the counties, as to such State-aid road mileage. It is not the purpose of this Act, however, to require the State Highway Board to abandon any of its present construction and paving projects, but it shall exercise its best judgment as to when and in what manner the roads hereby specially designated shall be completed and paved; and for the purpose of carrying into effect the provisions of this Act all necessary power and authority is hereby vested in the State Highway Board. Nothing in this Act shall be construed to add any additional maintenance cost for roads to the Highway Departments until such roads shall have been located and constructed as contemplated under this Act. Whenever, after the passage of this Act, the said State Highway Board shall, pursuant to the power and authority vested in it by that certain Act of the General Assembly of Georgia approved August 21, 1922, authorizing said board to "construct and maintain State-aid roads in and through towns or cities of not more than twenty-five hundred people," August 21st, 1925, limiting the total mileage of State-aid roads in said system to 6,300 miles as set forth in the published volume of Georgia Laws 1925, pages 207 and 208, and prior to the 31st day of December, 1928, shall immediately become a part of the State Highway System and shall be given preference in construction and pavement any State-aid road or roads in and through towns or cities of not more than twenty-five hundred people, all such State-aid mileage embraced and included within the incorporate limits of such towns or cities is hereby declared to be excluded from the limitation on the amount of highway mileage heretofore fixed at 6,300 miles by the Act approved August 21, 1925, as set forth in the published volumes of Georgia Laws for 1925, at pages 207, 208, and is also hereby declared to be excluded from any future limitation on the amount of such highway mileage. Nothing contained in this Act shall be construed to prevent any county of this State, in which there is located a town or city of not more than twenty-five hundred people, to receive its pro rata of the one cent gasoline tax now allocated to the counties, as to such State-aid road mileage in towns or cities of not more than twenty-five hundred people. Nor shall anything in this Act be construed to invalidate any special act of the General Assembly which may have heretofore been passed, or which may hereafter be adopted, incorporating into the State Highway System any Highway mileage which may have been included in or taken into the Federal-Aid System by the Bureau of Public Roads of the United States. Acts 1929, p. 266, § 3.

§ 828(19c). Highway Department not liable for damages on additional State-aid roads.—The State Highway Department of the State of Georgia shall not be liable under existing laws for damages accruing on such additional State-aid roads created by this Act, until the rights of way have been provided by the counties and construc-

tion hereon begun under the direction of the State Highway Board and such additional State-aid roads opened to traffic by the State Highway Department. Acts 1929, p. 268, § 4.

§ 828(19d). Contracts of Highway Department.—Any contracts heretofore made by the State Highway Department of Georgia with any of the counties of Georgia for the construction of any of the State-aid roads indicated upon the map of the State of Georgia, heretofore attached and made a part of this bill, shall be and remain of force, and the State Highway Department is hereby authorized to perform and execute said contracts in their entirety as originally contemplated by the State Highway Department and the various counties of the State of Georgia when such contracts were executed. Acts 1929, p. 268, § 5.

§ 828 (22). Labor, contracts for construction, etc.; condemnation of right of way.

As to liability of county where state condemns right-of-way, see note to sec. 828(27).

As to necessity of designating road as part of system as prerequisite to condemnation proceedings, see note to § 828(18).

Power of Condemnation Exercised by State.—This law prescribes a full and complete State method of laying out, constructing, and maintaining State-aid roads. The State highway board is given full authority and power to condemn rights of way for these roads. This power was so exercised in the case at bar and it can not be said that the proceeding was brought for and in behalf of the county and not in behalf of the State. *Cook v. State Highway Board*, 162 Ga. 84, 98, 132 S. E. 902.

§ 828 (27). Rights of way, counties to give.

Condemnation by State—Liability of County.—The fact that the proper county authorities are required to furnish rights of way, free to the State highway board, does not prevent that board from condemning rights of way for State-aid roads whenever the county authorities fail or refuse to furnish said rights of way. This provision may make the counties liable for expenditures incurred by the State highway board in acquiring these rights of way; but it does not bar this board from proceeding to condemn rights of way. *Cook v. State Highway Board*, 162 Ga. 84, 97, 132 S. E. 902.

§ 828 (28). Construction funds, etc.

In General.—Under this section, a county is authorized to appropriate and spend any funds properly applicable to such work, in building and maintaining any State-aid road; and where funds are raised from bonds which are duly voted for the purpose of paving such road, they become a trust fund, and can not be diverted from such purpose upon the grounds, (a) that a new route, which the State Highway Board has adopted in resurveying and relocating the old route, is more feasible, (b) that said board and the Federal Bureau of Roads refuse to furnish any funds with which to pave the old route, and (c) that there has been a violation of duty on the part of the State Highway Board. *Marks v. Richmond County*, 165 Ga. 316, 140 S. E. 880.

§ 828(30a). Fund for Highway Board from taxes on distributors of fuels.—Upon the written request of the State Highway Board, the Governor of the State is hereby authorized and fully empowered to assign and set aside not exceeding forty per cent of the revenue derived monthly, during the period beginning September 1st, 1929, and ending December 31st, 1930, from the taxes upon distributors of fuels allocated to the State Highway Department, as a special fund to be used exclusively for the purpose of paying warrants

against the same, as hereinafter provided. Acts 1929, p. 269, § 1.

§ 828(30b) Warrants on special fund.—In order to enable the State Highway Department to meet its obligations lawfully incurred, whether under the laws of this State or of the United States, and to which the State has by law given its assent, and when revenue from other sources is, in the opinion of the Governor and State Highway Board, not sufficient, the Governor of the State, upon the written request of the State Highway Board, is hereby duly authorized and fully empowered from time to time to draw his warrant or warrants against the special fund in the treasury, for such sum or sums as may be required to meet the obligations of the State Highway Department lawfully incurred, as provided in this section; the Governor is further authorized and empowered to discount and/or sell said warrants so drawn against said special fund, and to place the proceeds arising therefrom in the Treasury to the credit of the State Highway Department for the purpose of enabling the State Highway Department to meet its obligations lawfully incurred, as herein provided. Said warrants shall be duly countersigned by the Comptroller-General. The holders of said warrants shall have all the rights and privileges accorded by law to the holders of all other warrants drawn by the Governor and countersigned by the Comptroller-General. Acts 1929, p. 269, § 2.

§ 828(30c). Amount designated by Governor presumed correct.—In carrying the provisions of this Act into effect it shall be conclusively presumed, in every court of law or equity, that the monthly amount designated and set apart by the Governor by executive order in accordance with section 1 hereof has been correctly determined and set apart by the Governor pursuant to the terms of this Act. Acts 1929, p. 270, § 3.

SECTION 7

Construction of Roads by County

§ 828 (31). Reimbursement of counties for expenditures.

Construction by State Through Municipality—Liability for Damages.—The decision in *Lee County v. Smithville*, 154 Ga. 550, 115 S. E. 107, to the effect that the State highway department, in conjunction with the county authorities, may construct a "State-aid road" through a municipality without its consent and even against its will, can have no application so as to preclude a liability against the municipality for damage done to private property by a change in a grade of one of its streets which the municipality knowingly permitted to be made where such street is not part of the highway being constructed or repaired but is entirely disconnected therefrom and is graded merely for the purpose of obtaining dirt with which to widen another street or road which is occupied as a part of the highway. *Cleveland v. Kimsey*, 34 Ga. App. 480, 130 S. E. 159.

The municipal authorities in such a case having power to prevent such change in the grade of the street may be held liable for damages to private property resulting therefrom where they knowingly permit the work to be done. *Cleveland v. Kimsey*, 34 Ga. App. 480, 130 S. E. 159.

Power of County to Construct Municipal Roads.—County authorities are not authorized to expend the proceeds of the sale of bonds issued by the county for the purpose of

raising money with which to pave and grade the public roads in that county, for the pavement or grading or improvement of streets in a municipality located in the county; and the court did not err in granting an injunction to restrain them from so doing. *Mitchell County v. Cochran*, 162 Ga. 810, 134 S. E. 768.

§ 828 (33). Power to sue and to condemn rights of way.

As to liability for payment, see note to § 828(27).

CHAPTER 13C

County Depositories

§ 848(7) County commissioners, authorized to name depositories in certain counties. — The boards of county commissioners, sometimes called boards of roads and revenues, of any county in this state having therein a city with a population of not less than fifty-two thousand, nine hundred, ninety-five, and not more than eighty thousand, according to the United States Census of 1920, or the ordinaries in such counties having no such boards, be and they are hereby authorized to designate one or more banks located in such county as a depository for public funds to which the county is presently or ultimately entitled. Such depository or depositories shall be designated for a term to expire on December 31 next succeeding the naming of such depository or depositories, or until the prior order of the authority naming such depository, entered for good cause, revokes such designation. Any such depository or depositories named shall, before entering upon its duties as such depository, enter into bond with security approved by the authority naming such depository, conditioned for the payment to such county of any and all funds received by such depository under such appointment. Any such bond shall cover the fees which may be collected by the sheriff, tax-collector, tax-receiver, clerk of the superior court, ordinary, sheriff or other officer who may be paid a salary in lieu of fees, the county being entitled to fees accruing to the several offices, or any other funds to which the county may be presently or ultimately entitled. Acts of 1929, p. 224, § 1.

§ 848(8). Term of Depository.—Any depository so qualifying under the terms of the preceding section shall continue to act until the end of the term herein specified, or prior order of the authority designating it as depository, revoking its authority so to act, or until ten days after written notice by such depository to such appointing power, asking to be relieved as such depository. Acts 1929, p. 225, § 2.

CHAPTER 14

County Police, Election, and Maintenance

§§ 849-850. Park's Code.

See §§ 855(1)-855(2).

§ 855 (1). Policemen of good character to be appointed.

County Policeman Not an Employee under Compensation Act.—See note under this catchline under section 3154(2) subdivision (b).

The act of 1914 (this chapter of the Code) applies to all counties of the State. *Eison v. Shirley*, 165 Ga. 374, 378, 141 S. E. 295.

§ 855 (2). Salaries and expenses; levy of tax.

Under this section, the ordinary is without authority to appoint a policeman under an agreement by which he is to be paid for work done in enforcing the prohibition law by destroying stills, and for which he is to be paid so much for each still destroyed, to be paid out of the funds derived by fines and forfeitures from the enforcement of the prohibition law. If such work or service is rendered under a contract which the ordinary is not authorized to make, no implied obligation arises on the part of the county to pay for such services, even though the county receives the benefit. *Eison v. Shirley*, 165 Ga. 374, 141 S. E. 295.

§§ 855(35)-855(37). Park's Code.

See §§ 431(1)-431(3).

SEVENTH TITLE

Municipal Corporations

CHAPTER 2

Municipal Taxation

ARTICLE 1

Assessors

§ 862. (§ 717.) Tax assessors for city.

Effect upon Existing Power.—As stated in the proviso of the section, the charter powers conferred upon the mayor and aldermen of Savannah as assessors were not taken away by the subsequent enactment of this section. *Tietjen v. Mayor*, 161 Ga. 125, 130, 129 S. E. 653.

ARTICLE 3

Assessments for Street and Other Improvements

§ 869. (§ 723). Municipalities may issue executions for paving, etc.

Similar to a Tax Fi. Fa.—A fi. fa. issued by a city under this section is in the nature of a tax fi. fa. and governed by the same procedure, and must be taken to be subject to the same period of limitation. *Lewis v. Moultrie Banking Co.*, 36 Ga. App. 347, 348, 136 S. E. 554. See *Brunswick v. Gordon Realty Co.*, 163 Ga. 636, 136 S. E. 898.

Cited in *Montezuma v. Brown Bros.*, 168 Ga. 1, 147 S. E. 80.

CHAPTER 3

Power of Municipality and Its Officers.

ARTICLE 1

Councilmen Incompetent to Hold Other Office.

§ 886. (§ 739). Councilman, when incompetent

to hold other municipal office.—Councilmen and aldermen of the towns and cities of this State shall be incompetent to hold, except in towns of less than two thousand inhabitants, any other municipal office in said towns and cities during the term of office for which they were chosen; provided, nothing herein shall render them ineligible to be elected during said term, to serve in a term immediately succeeding said term, but nothing in this section shall apply to any municipal office which is filled by appointment of the mayor. Any councilman or alderman appointed during his term to any other municipal office shall resign before being eligible to enter upon the office to which he has been appointed. In cities of more than eighty thousand inhabitants, councilmen and aldermen, during the term of office for which they were chosen, are incompetent to hold any office in said cities which is filled by appointment or election of the general council or governing board, but are competent to hold any other office in said cities, having first resigned the office of councilman or alderman; provided, nothing herein contained shall be construed as repealing any provisions to the contrary hereof in any charter of any city or town in this State. In cities of this State whose inhabitants, according to the census of 1920, were between the number of 16,890 and 16,900, aldermen of said cities shall be eligible for the election of mayor of said cities, when the election for said mayor shall occur during the term of office of said aldermen, and shall be qualified to act as said mayor, if elected, upon their resigning their said office of alderman." Acts 1899, p. 26; 1890-1, pp. 226; 1895, p. 79; 1902, p. 40; 1929, p. 156, § 1.

ARTICLE 2

Cities as Trustees—Parks

§ 891(1). Purchases of realty by cities of 200,000 or more population.—Any city in the State of Georgia having a population of 200,000 or more, according to the last or any subsequent Federal census, may through its governing body purchase on time or partly for cash, with balance on time or deferred payments, or otherwise acquire any real property or interest in real property within or without the limits of such city, securing the note or notes, claim or claims, for deferred payments and interest thereon, with mortgages or deed of trust on the land purchased, or with or by means of an instrument in writing retaining title thereto in the vendor, or enter into any other contractual arrangement whereby provision is made that such note or notes, claim or claims, or other instruments for deferred payment and interest thereon, and all lawful charges, shall not be a charge or charges against the general credit of the city, or be a general liability thereof, but that the liability shall only extend to and be a charge against the land so purchased or acquired. Such method of acquisition provided for in this section shall not be considered or deemed exclusive, but cumulative and in addition to all other methods of acquisition of lands or interests therein for public purposes heretofore, hereafter, or by other

provisions in this Act provided. This section shall apply to all cities of the State of Georgia, now or hereafter having a population of 200,000 or more, according to the last or any subsequent Federal census. The term "such city" as used in this section refers to and means all and only those cities of the state of Georgia having a population of 200,000 or more, according to the last or any subsequent Federal Census. The term "governing body" as used in this Act means the mayor and city council, the commissioner and commissioners, or either or both as the case may be, or the "governing body" by whatever name called of any city coming under the provisions of this Act. Acts 1929, p. 304, §§ 1, 2.

ARTICLE 3

Limitation of Powers of City and Its Officers

§ 894. (§ 745). Obstructions in street.

Use of Streets Not Absolute.—The use of streets and highways is not absolute and unrestricted, but is subject to reasonable regulation. *Schlesinger v. Atlanta*, 161 Ga. 148, 129 S. E. 861.

Same—Restriction of Busses.—The use of streets by common carriers for the purpose of gain is extraordinary and may be conditioned or prohibited as the legislature or municipality deems proper. Hence, if the State or city determines that the use of streets by busses should be restricted or prohibited there is nothing in the Constitution of the United States or this State which prohibits such action. *Schlesinger v. Atlanta*, 161 Ga. 148, 161, 129 S. E. 861, citing numerous authorities.

§ 897. (§ 748). Municipal corporations liable for what.

Applied in *Newton v. City of Moultrie*, 39 Ga. App. 702, 148 S. E. 299.

§ 898. (§ 749). Municipal corporations liable for injuries, when.

General Rule.—Stated in *Atlanta v. Robertson*, 36 Ga. App. 66, 135 S. E. 445, as set out under this catchline in the Georgia Code of 1926.

Proximate Cause.—Irrespective of whether a municipal corporation is exercising a "governmental function" in allowing a part of its sewerage system to become worn and in a bad state of repair, where a traveler upon a public street in a city is injured in consequence of a dangerous condition under the surface of a street, of which the city knew or should have known in time to repair it or to give warning of its existence before the injury, the city can not escape liability upon the ground that such condition of the streets was due to its failure to repair its sewerage system. *Atlanta v. Robertson*, 36 Ga. App. 66, 135 S. E. 445.

§ 899. (§ 750). Municipal property not subject to levy.

Property Cannot Be Encumbered.—A city board of education has no authority to place an incumbrance upon articles which it had unconditionally purchased on account several months previously, and which it had installed as necessary to the operation of the schools. *Southern School Supply Co. v. Abbeville*, 34 Ga. App. 93, 101, 128 S. E. 231, and cases cited.

§ 900. (§ 751). Voting when personally interested.

Effect on Contract.—A contract between the City of Atlanta and a construction company, in which a member of council is a large stockholder, is null and void, although such member of council did not vote for the ordinance authorizing such contract, and did not use his influence in

procuring other members of council to approve and authorize the making of such contract, and although such contract is fair and free from fraud. *Montgomery v. Atlanta*, 162 Ga. 534, 134 S. E. 152.

Where such an illegal contract has been made, it cannot subsequently be ratified by the resignation of the interested councilman and the confirmation of the contract by the council. *Montgomery v. Atlanta*, 162 Ga. 534, 547, 134 S. E. 152.

Councilman Employed as Attorney by Contractor.—Abutting owners cannot complain after completion of a municipal contract because of illegal participation in execution of municipal contract by councilman who had been employed as attorney by contractor. *Cochran v. Thomasville*, 167 Ga. 579, 582, 146 S. E. 462.

ARTICLE 7

Disposition of Public Utility Properties; Sale or Lease of Plant

§ 904(a). Park's Code.

See § 913(2).

§ 904(l). Park's Code.

See § 913(13).

§ 904(m). Park's Code.

See § 904(1).

§ 904(p). Park's Code.

See § 904(4).

§§ 904(t)-904(ll). Park's Code.

See §§ 913(23)-913(38).

§ 904 (1). Sale, lease or other disposition by municipality.

See notes to § 125.

Giving due effect to the proviso, of this section construed, as it must be, in connection with the acts creating the charter of the City of Alma, that city has authority to sell its electric-light plant without the necessity of submitting the question of sale to the voters of the city. *Byrd v. City of Alma*, 166 Ga. 510, 143 S. E. 767.

If a municipality owning an electric plant which it desires to sell, and having an opportunity to make a sale thereof on condition of complying with this section, has authority to make the sale, and causes the required notice of sale to be published, and, after filing of objections by protestants against the sale, an election is held, and the returns of the election show a sufficient number of affirmative votes to authorize the sale, and the result is declared, and certain of the protestants file a petition with the ordinary to contest the election, the effect of which is to delay or prevent consummation of the sale of the property to the contemplated purchaser, equity will entertain a petition on the part of the city against the ordinary and the protestants, to prevent further entertainment or prosecution of the so-called contest of election before the ordinary. *Byrd v. City of Alma*, 166 Ga. 510, 143 S. E. 767.

§ 904 (4). Election; majority vote.

This provision of this section does not by its own terms expressly or impliedly provide for a contest of an election held under the terms of the act, before the ordinary of the county. *Byrd v. City of Alma*, 166 Ga. 510, 143 S. E. 767. See notes to § 125.

CHAPTER 6

Demand Before Suit

§ 910. Demand prerequisite, etc.

Substantial Compliance Must Be Alleged.—In a claim

for money damages against a municipal corporation on account of injuries to person or property, the petition must affirmatively allege a compliance with the provisions of this section quoted above, and unless it does so, it should be dismissed on demurrer. *Newton v. City of Moultrie*, 37 Ga. App. 631, 148 S. E. 299, citing *Saunders v. City of Fitzgerald*, 113 Ga. 619, 38 S. E. 978.

An allegation in the renewal petition to the effect that prior to the institution of the former suit, which was against a municipal corporation, the plaintiff had served upon the defendant a written notice of claim, as provided by this section, in which the plaintiff claimed damages arising out of the same cause of action as that sued on in the renewal petition, is not an allegation as to the cause of action sued on in the former suit. *Barber v. City of Rome*, 39 Ga. App. 225, 146 S. E. 856.

But in *Habersham County v. Cornwall*, 38 Ga. App. 419, 420, 144 S. E. 55, it is said: "If it was necessary at all to allege a compliance with section 910 of the Civil Code, which requires a presentation in writing to the governing authorities of towns and cities of any claim for damages, before bringing suit thereon against any such municipality (see *Grooms v. Hawkinsville*, 31 Ga. App. 424, 120 S. E. 807; Civil Code (1910), § 411), the allegations upon that subject were not open to demurrer merely because no copy of such claim was attached to the petition."

Leaving Notice with Clerk of City Commission.—The filing of the required notice in writing in the office of, and leaving of it with, the officer who is the secretary or the clerk of the city commission, which is the governing authority of the city, and is the officer who is the custodian of the records of the city, is a presentation of the claim to the governing authority of the city as required by this section. *Davis v. City of Rome*, 37 Ga. App. 762, 142 S. E. 171.

CHAPTER 9

System of Supervised Recreation

§§ 913(rr-1)-913(rr-18). Park's Code.

See P. C. §§ 1519(56)-1519(73).

§ 913 (2). Application of act, etc.

This article as originally introduced, does not impinge or offend the provisions of § 6391 of the constitution. *Wilson v. City Council*, 165 Ga. 520, 141 S. E. 412. But see note to § 913(13).

§ 913 (13). Application of provisions of act.

In *Wilson v. City Council*, 165 Ga. 520, 141 S. E. 412, it is said: "The controlling question in this case, therefore, is whether this section, which is clearly unconstitutional, shall invalidate the entire enactment and thus destroy the purpose of the General Assembly to further and promote the creation of a system of playgrounds, or whether it is the court's duty to preserve and enforce the intention of the General Assembly by cutting away that portion of the act which is obnoxious to § 6391, of the constitution. Applying the second rule that, as much of the act must be preserved as possible, and since upon consideration the portion of the act not excised therefrom is not in violation of the constitutional provision with which it is alleged to be in conflict, the act of the General Assembly above referred to, except section 11a thereof, must be held to be constitutional and enforceable."

CHAPTER 11

Repeal or Amendment of Municipal Charters

§ 913(ss). Park's Code.

See § 913(19).

§ 913(19). Referendum, when necessary.—No local law seeking a repeal of a municipal charter of

cities of less than fifty thousand inhabitants, or an amendment to any municipal charter of cities of less than fifty thousand inhabitants, which amendment materially changes the form of government of a municipality or seeks to substitute other officers for municipal control other than those in control under existing charter, shall become effective until such repeal or amendment shall be voted upon by the qualified voters of the municipality to be affected as hereinafter provided. Acts 1925, p. 136; 1927, p. 245.

Editor's Note.—Prior to the amendment of 1927, this section applied to repeal or amendment of charters of cities which have a population of less than two hundred thousand. The present section is limited to cities with a population of less than fifty thousand.

CHAPTER 12

Street Improvements in Certain Cities

§ 913(23). Definitions.—In this Act the term “municipality” means any city or town in the State of Georgia now or hereafter incorporated, having a population of six hundred or more.

“Governing body” includes mayor and council, board of aldermen, board of commissioners, or other chief legislative body of a municipality.

The words “improve” and “improvement” include the grading, regrading, paving, repaving, macadamizing, and remacadamizing of streets, alleys, sidewalks, or other public places or ways, and the construction, reconstruction, and altering of curbing, gutting, storm-sewers, turnouts, water-mains, and water, gas, or sewer connections therein.

The word “streets” include streets, avenues, alleys, sidewalks and other public places or ways.

The word “pave” shall include storm drainings, paving, macadamizing, and grading.

“Frontage” means that side or limit of the lot or parcel of land in question which abuts on the improvement. Acts 1927, p. 322.

The act of the General Assembly, entitled an act to provide a system under which certain classes of municipalities may grade, pave, etc., their streets and alleys, approved August 25, 1927 (Ga. L. 1927, p. 321), is not unconstitutional on the ground that it is in conflict with § 6391. *Wheat v. Bainbridge*, 168 Ga. 479, 148 S. E. 332.

The act under consideration is not unconstitutional on the ground that “it is general in its nature but not uniform in its operation, because it is made an alternative method of procedure, and its application is dependent upon its adoption by a favorable vote of the electors, whereas the constitution does not contemplate the enactment of a law general in its nature, the application of which shall be optional with the municipality, either under a prior local law or a local law enacted subsequent to such general law.” *Wheat v. Bainbridge*, 168 Ga. 479, 148 S. E. 332.

§ 913(24). Referendum as to adoption of this Act.—The governing body of any municipality in the State of Georgia is hereby authorized and empowered to hold an election (or elections), at such time and under such conditions as may be determined by said governing body, for the purpose of adopting the provisions of this chapter; and when such election has been duly held and a majority of the qualified electors voting therein shall have voted in favor of such adoption, and the election managers shall have duly certified

the results of such election to the governing body, and the same shall have been adopted and entered on the minutes thereof, then the aforesaid governing body of such municipality shall be and is hereby authorized and empowered to improve any street or streets in such municipality whenever in the judgment of its governing body the public welfare or convenience may require such improvement, subject only to the conditions and limitations herein prescribed. Acts 1927, p. 322.

§ 913(25). Resolution declaring improvement necessary; publication; protest; contract assessment; etc.—Whenever the said governing body shall deem it necessary to improve any street or any part thereof either in length or width, within the limits of said municipality, and said governing body shall by resolution declare such improvement necessary to be done, and publish such resolution once a week for at least three consecutive weeks in the newspaper in which the sheriff's advertisements of the county in which such municipality is located are published, and if the owners of a majority of the lineal feet of frontage of the lands abutting on said improvement shall not in fifteen days after the last day of publication of such resolution file with the clerk of said city their protest in writing against such improvement, then said governing body shall have power to cause said improvement to be made, and to contract therefor, and to make assessments and fix liens as provided for herein. Any number of streets or any part or parts thereof to be so improved may be included in one resolution, but any protest or objection shall be made as to each street separately; provided, however, that if the owners of a majority of the lineal feet or frontage of the land liable to assessment for such improvement shall petition the governing body for such improvement, citing this chapter and designating by general description the improvement to be undertaken and the street or streets or part thereof to be improved, it shall thereupon be the duty of said governing body to proceed, as hereinafter provided, to cause said improvements to be made in accordance with the prayers of said petition and their own best judgment, and in such cases the resolution hereinbefore mentioned shall not be required. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. Acts 1927, p. 323.

§ 913 (26). Assessment on basis of frontage; intersecting streets.—Each lot or parcel of land abutting upon said improvement shall be charged on a basis of lineal-foot frontage at an equal rate per foot of such frontage with its just pro rata of the entire cost of said improvement, less any amounts paid by street or steam railways or others; provided, however, that the cost of the sidewalks, curbs, and gutters shall be charged entirely to the lots or parcels of land abutting on that side of the street upon which the same are constructed. The frontage of intersecting streets shall be assessed as real estate abutting upon the improvement, and the municipality, for all purposes of this chapter, shall be deemed to the

owner thereof, and the mayor or chairman of the board of commissioners shall have authority to sign the petition or file objections provided for herein; and the governing body of the municipality shall pay from the city treasury, as other current bills are paid, its just pro rata of the entire cost of said improvement, unless the owners of a majority of the aforesaid frontage in the petition hereinbefore provided for shall agree to pay the entire cost of said improvement, or unless in the resolution hereinbefore provided for it shall be stated that the entire cost of the improvement is to be paid by the abutting property owners. Acts 1927, p. 324.

§ 913(27). Railroads.—Any railroad or street railway having tracks located in a street at the time of the proposed improvement as provided herein shall be required by the governing body to pave the width of its tracks and two feet on each side thereof, and, except as hereinafter provided, with the same material and in the same manner as the rest of the street is to be paved, and such work shall be performed under the supervision and subject to the approval of the city's engineer, and if such railway shall not, within a period of thirty days after receipt by such railway of the notice to do such work, agree in writing to comply with such order, or if the work is not completed to the satisfaction of the city's engineer within such time as may be described by the governing body, said governing body may have such work done and charge the cost and expense thereof to such railway company located in the municipality and said lien shall have the same rank and priority and shall be enforced in the same manner as the liens provide for in section 913(31). The governing body may, however, require such paving to be of a different material and manner of construction, when, in its judgment such is rendered necessary by the railway uses of the street. Acts 1927, p. 324.

§ 913(28). Powers as to ordinances.—Whenever the petition provided for in section 913(25) is presented, or when the said governing body shall have determined to improve any street, and shall have passed the resolution provided for in said section 913(25), the said governing body shall then have the power to enact all ordinances and to establish all such rules and regulations as may be necessary to require the owners of all the property abutting on the improvement and of any railway in said street to pay the cost of such improvement, and to cause to be put in and constructed all water, gas, or sewer-pipe connections to connect with any existing water, gas, or sewer-pipes in and underneath the streets where such improvement is to be made, and all cost and expense of making such connections shall be taxed solely against such property, but shall be included and made a part of the general assessment to cover the cost of such improvement. Acts 1927, p. 325.

§ 913(29). Resolution as to kind and extent of improvement; contracts; bonds; etc.—After the expiration of the time for objection or protest on the part of the property owners, if no sufficient pro-

test is filed, or on receipt of a petition for such improvement signed by the owners of a majority of the frontage of the land to be assessed, if such petition be found to be in proper form and properly executed, the governing body shall adopt a resolution reciting that no protest has been filed, or the filing of such petition, as the case may be, and expressing the determination of said governing body to proceed with the said improvement, stating the kind of improvement and defining the extent and character of the same, and other such matters as may be necessary to instruct the engineer employed by said municipality in the performance of his duties in preparing for such improvement the necessary plans, plats, profiles, specifications, and estimates. Said resolution shall set forth any and all such reasonable terms and conditions as said governing body shall deem proper to impose with reference to the letting of the contract and the provisions thereof; and said governing body shall by said resolution provide that the contractor shall execute to the city a good and sufficient bond as provided in the Act entitled "Contractors of Public Work Bonded," approved August 19, 1916, and may require a bond in an amount to be stated in such resolution for the maintenance of good condition of such improvements for a period of not less than five (5) years from the time of its completion, or both, in the discretion of said governing body. Said resolution shall also direct the clerk of said municipality to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvements. The notice of such proposals shall be published in at least six consecutive issues of a daily paper, or at least two of a weekly paper, having a general circulation in said municipality, and shall state the street or streets to be improved, the kinds of improvements proposed, what, if any, bond or bonds will be required to be executed by the contractor aforesaid, and shall state the time when and the place where such sealed proposals shall be filed and when and where the same will be considered by said governing body. At the time and place specified in such notice the governing body shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work and furnish the materials which may be selected and perform all the conditions imposed by said governing body as prescribed in such resolutions and notice for proposals, and the said governing body shall have the right to reject any and all bids and readvertise for other bids when the bids submitted are not, in its judgment, satisfactory. Acts 1927, p. 326.

§ 913(30). Appraisers to apportion cost to abutting land.—After the said contract is let and the cost for such improvement, which shall include all other expenses incurred by the city incident to said improvement in addition to the contract price for the work and materials, is ascertained, the said governing body shall by resolution appoint a board of appraisers consisting of three members to appraise and apportion the cost and expense of the same to the several tracts of land abutting on said improvement as hereinbefore provided. Within thirty days from the date of the

resolution appointing said board, it shall file with the clerk of the municipality a written report of the appraisal and the assessment and cost upon the several lots and tracts of land abutting on said street, or upon the property of any street or steam railway whose tracks are located in such street where such railway has failed or refused to do the paving provided herein when and as required by the governing body. When said report shall have been returned and filed, the said governing body shall appoint a time for the holding of a session, or shall designate a regular meeting of their body for the hearing of any complaints or objections that may be made concerning the said appraisal, apportionment, and assessment by any person interested, and notice of such session for the said hearing shall be published by the clerk of the governing body once a week for two weeks in a newspaper having a general circulation in said municipality, and said notice shall provide for an inspection of such return by any property owner or other party interested in such return. The time fixed for said hearing shall not be less than five nor more than ten days from the date of the last publication. The said governing body at said session shall have power, and it shall be its duty, to review and correct said appraisal, apportionment, and assessment, and to hear objections to the same, and to confirm the same either as made by said board or as corrected by said governing body. The said governing body shall by ordinance fix the assessments in accordance with said appraisal and apportionment, as so confirmed, against the several tracts of land liable therefor; provided, however, that the rate of interest to be taxed shall not exceed one per cent per annum over and above the rate of interest stipulated in the bonds herein provided for. Assessment in conformity to said appraisal and apportionment as confirmed by said municipality shall be payable to the treasurer of such municipality in cash, and, if paid within thirty days from the date of the passage of said ordinance, without interest; provided however, that in the event the owner of the land or of any street railway so assessed shall, within thirty days from the passage of the ordinance making the assessment final, file with the clerk of the said municipality his or its written request asking that the assessments be payable in installments in accordance with the provisions hereof, the same shall thereupon be and become payable in ten equal annual installments and shall bear interest at the rate of not exceeding seven per cent per annum until paid, and each installment together with the interest on the entire amount remaining unpaid shall be payable each year at such time and place as shall be provided by resolution of the governing body. Acts 1927, p. 327.

§ 913(31). Lien of assessment; date of lien.—

Such special assessment and each installment thereof, and the interest thereon and the expense of collection, are hereby declared to be a lien against the lots and tracts of land so assessed from the date of the ordinance levying the same, coequal with the lien of other taxes and prior to and superior to all other liens against such lots or tracts, and such lien shall continue until such as-

essment and interest thereon shall be fully paid, and shall be enforced in the same manner as are liens for city taxes. Acts 1927, p. 328.

§ 913(32). Bonds.—The said governing body, after the expiration of thirty days from the passage of said ordinance confirming and levying said assessment, shall by resolution provide for the issuance of bonds in the aggregate amount of such assessments remaining unpaid, bearing date not more than thirty days after the passage of the ordinance fixing the said assessment and of such denomination as the said governing body shall determine, which bond or bonds, unless authority is hereafter granted and exercised for making the same a direct obligation of the municipality, shall in no event become a liability of the municipality or of the governing body of the municipality issuing same. One tenth in amount of any such series of bonds with interest upon the whole series to date, shall be payable on such day and at such place as may be determined by the governing body, and one tenth thereof with the yearly interest upon the whole amount remaining unpaid shall be payable on the same day in each succeeding year until all shall be paid. Such bonds shall bear interest at a rate not exceeding six per cent per annum from their date until maturity, payable annually, and shall be designated as "street-improvement bonds," and shall on the face thereof recite the street or streets, part of street or streets, or other public places for the improvement of which they have issued, and, unless authority is hereafter granted and exercised for making the same a direct obligation of the municipality, that they are payable solely from assessments which have been fixed upon the lots or tracts of land benefited by said improvement under authority of this chapter. Said bonds shall be signed by the mayor or chairman of the board of commissioners, and attested by the clerk of the governing body, and shall have the impression of the corporate seal of such municipality thereon, and shall have interest coupons attached, and all bonds issued by authority of this chapter shall be payable at such place either within or without the State of Georgia as shall be designated by said governing body. Said bonds shall be sold by said governing body at not less than par, and the proceeds thereof applied to the payment of the contract price and other expenses incurred pursuant to the provisions of this chapter, or such bonds in the amount that shall be necessary for that purpose may be turned over and delivered to the contractor at par value in payment of the amount due him on his contract, and the portion thereof which shall be necessary to pay other expenses incident to and incurred in providing for said improvements shall be sold or otherwise disposed of as the said governing body shall direct. Any proceeds from the sale of said bonds remaining in the hands of the treasurer after the payment hereinbefore provided for shall go into the treasury of the municipality as compensation for the services to be rendered by it as contemplated herein. Acts 1927, p. 329.

§ 913 (33). Treasurer's duty as to collection;

sales to pay assessment; affidavit of illegality.—The assessment provided for and levied under the provisions of this chapter shall be payable as the several installments become due, together with the interest thereon, to the treasurer of the municipality, who shall keep an accurate account of all such collections by him made, and such collections shall be kept in a special fund to be used and applied for the payment of such bonds and the interest thereon and expenses incurred incident thereto, and for no other purpose, until all said bonds are paid in full; and said treasurer shall give bond in amount to be fixed by the governing body, conditioned upon the faithful performance by him of the duties imposed herein. It shall be the duty of said treasurer, not less than thirty days and not more than fifty days before the maturity of any installment of such assessments, to publish at least one time, in a newspaper having a general circulation in said municipality a notice advising the owner of the property affected by such assessment of the date when such installment and interest will be due, and designating the street or streets or other public places for the improvement of which such assessments have been levied, and that, unless the same shall be promptly paid, proceedings will be taken to collect said installment and interest, or in lieu thereof to mail such notice within the time limits aforesaid to the owners of record of the property affected, at their last known address. And it shall be the duty of said treasurer, promptly within fifteen days after the date of the maturity of any such installment or assessment or interest, to issue an execution against the lot or tract of land assessed for such improvement, or against the party or person owning the same for the amount of such assessment or interest, and shall turn over the same to the marshal or chief of police of the municipality or his deputy, who shall levy the same upon the abutting real estate liable for such assessment and previously assessed for such improvements, and after advertisement and other proceedings as in case of sales for city taxes the same shall be sold at public outcry to the highest bidder, and such sales shall vest an absolute title in the purchaser, subject to the lien of the remaining unpaid installments with interest, and also subject to the right of redemption as provided in sections 880, 1169, 1170, 1171, and 1172 of the Code of Georgia; provided that the defendant shall have the right to file an affidavit denying that the whole or any part of the amount for which said execution issued is due, and stating what amount he admits to be due, which amount so admitted to be due shall be paid and collected before the affidavit is received, and the affidavit received for the balance. All affidavits (and the foregoing and following provisions shall apply to the railroads or street railways against whom execution shall be issued for the cost and expense of paving) shall set out in detail the reasons why the affidavit claims the amount is not due, and, when received by the city marshal or chief of police, shall be returned to the superior court of the county wherein the municipality is located, and there be tried and the issue determined as in cases of illegality, subject to all the pains and penalties provided for

in other cases of illegality for delay under the Code of Georgia. The failure of said treasurer or clerk to publish or mail said notice of maturity of any installment of said assessment and interest shall in no wise effect the validity of the assessment and interest and the execution issued therefor. Acts 1927, p. 330.

§ 913(34). Suit to enjoin assessment, etc.; time limit.—No suit shall be sustained to set aside any such assessment, or to enjoin the said governing body from making or fixing or collecting the same or issuing or levying executions therefor or issuing such bonds or providing for their payment as herein authorized, or contesting the validity thereof on any grounds or for any reason other than the failure of the governing body to adopt and publish the preliminary resolution provided for in section 913(25) in cases requiring such resolution and its publication, or to give notice of the hearing of the return of the appraisers as herein provided for, unless such suit shall be commenced within thirty days after the passage of the ordinance making such assessment final; provided, that in the event any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, the said governing body may at any time, in the manner provided for the making of an original assessment, proceed to cause a new assessment to be made and fixed, which shall have like force and effect as an original assessment. Acts 1927, p. 332.

§ 913(35) Assessment where county is land owner.—Whenever the abutting-land owners of any street of said municipality petition the governing body as herein set out, or said governing body pass the resolution provided for in section 913(25) for the improvement of any street where the county is owner of property on said street, and the governing body of such county has assented to the proposed improvement and has provided funds to pay in cash its proportionate part of the cost of said improvement, the frontage so owned is to be counted as if owned by an individual, for all the purposes of this chapter and the chairman of the board of commissioners of such county is authorized to sign the aforesaid petition or file objections in behalf of the county. Acts 1927, p. 332.

§ 913(36) Special laws not repealed.—This chapter shall not be construed to repeal any special or local law, or affect any proceedings under such for the making of improvements hereby authorized or for raising the funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete Act not subject to any limitations or restrictions contained in any other public or private law or laws except as herein otherwise provided. Act 1927, p. 332.

This section is not violative of section 6341 of our State constitution. *Wheat v. Bainbrigt*, 168 Ga. 479, 148 S. E. 332.

§ 913(37) Payment of part by municipality.—

Where the municipality desires to pay any portion of the cost of the improvements contemplated herein, in addition to the amounts hereinbefore provided for, the balance may be assessed against the abutting property or the owners thereof, or the owners of any street or steam railway therein, as hereinbefore provided for. Acts 1927, p. 333.

§ 913(38) Proceeding to validate lien.—Any time within sixty days after the assessments are finally determined and fixed as hereinbefore provided for, it shall be lawful for the municipality to file a petition in the superior court of the county in which the said municipality is situated, wherein shall be alleged the fact of the passage and approval of the ordinance, and a copy thereof, the street or part of a street affected thereby, the character of paving or other improvement intended, and the approximate estimate of the cost. Said petition shall allege that the ordinance is authorized by law, and that it will create a lien on all real property abutting on such street or part of a street, for the payment by the owner of each lot or parcel of land so abutting, of the pro rata share of expense assessed to each said lot or parcel of land, as well as on any street or other railroad therein, if any such there be, and shall pray for a judgment by the court declaring such ordinance valid, legal, and binding, and that the liens be set up as alleged. It shall not be necessary in such petition to allege the names of the owners of the abutting property of railroads to be affected, but shall be sufficient to describe the street or portion thereof to be improved, and to indicate, as hereinbefore provided, that the property on said street is to be charged with the expense. At or before the filing of such petition, the same shall be presented to the judge of said court, who shall thereupon pass an order calling upon all persons owning or interested in the real estate abutting on said street, or on the designated part thereof, to show cause, at a time and place to be in said order named, why the prayer of the petition should not be granted and the ordinance and assessments declared valid and the liens be fixed as legal and binding, which time shall not be less than thirty nor more than sixty days later and either in term time or vacation, and either in open court or at chambers. It shall thereupon be the duty of the clerk to publish once a week for four weeks in the official organ of the county, a statement of the case and a copy of said order. At the time and place named, or at such other time and place as the hearing may be adjourned to, any person interested shall be heard to show cause in writing, which writing shall be filed with the clerk, why the prayer should not be granted. The court shall hear all questions of law or fact, and all competent evidence may be offered as in other cases; and the court shall thereupon pass an appropriate order finding and adjudging that said ordinance is lawful and valid and said liens legal and binding, or otherwise, as the law and facts may warrant. The municipality or any person appearing, and who may be dissatisfied with said judgment, may within ten days file a bill of exceptions and carry the matter up to the Supreme Court or the Court of Appeals, as the case may be, for review as in cases of in-

terlocutory injunction. If the final judgment of the superior court shall be in favor of the validity of the ordinance and of the liens claimed, the same shall forever be conclusive, and said matters so determined shall never be thereafter drawn in question in any court. Bonds issued under the provisions of this chapter after such judgment shall have written or stamped thereon the words "Validated and Confirmed by judgment of the Superior Court," specifying also the date when such judgment was rendered and the court wherein it was rendered, which shall be signed by the clerk of the said superior court, and said entry shall be original prima facie evidence of the fact of such judgment, and receivable as such in any court of this State. In any case in which similar bonds have been heretofore issued by any municipality under the authority of particular local Acts, it shall be lawful to validate the same and fix the assessments by final judgment of the superior court under like proceedings and with like effect; provided, however, that before the municipality shall institute such proceedings in such cases, the holder or holders of such bonds or any part thereof shall give to the municipality good and sufficient bond and security to indemnify and hold harmless the municipality against any court costs or other expenses incident to such validating proceedings, the sufficiency of such bond and the security to be approved by the chief executive officer of the municipality. Acts 1927, p. 333.

EIGHTH TITLE

Public Revenue

CHAPTER 1

Taxation

ARTICLE 1

Ad Valorem, Specific, and Occupation Taxes

§ 993(2). Park's Code.

See § 993(4).

§ 993 (4). Poll tax; exemptions; registered female voters.

Registration as Prerequisite to Tax.—A female more than 21 years of age, by the provisions of the act of 1923, properly construed, is not required to pay poll-tax except for those years in which she may be registered as a voter. *Hawthorne v. Turkey Creek School Dist.*, 162 Ga. 462, 134 S. E. 103.

Poll Tax Prior to 1922.—Females in this State, who were otherwise qualified to vote, might have voted at any time between August 26, 1920, and December 20, 1922, without paying poll-tax prior to such voting. *Davis v. Warde*, 155 Ga. 748, 118 S. E. 378. Thus there was no poll-tax required of females prior to December of 1922. *Hawthorne v. Turkey Creek School Dist.*, 162 Ga. 462, 468, 134 S. E. 103.

§ 993 (24). Cars operated for hire.

Effect upon Municipal Taxation.—The imposition of a tax

under this act and its payment by jitney owners does not confer upon them the right to operate their jitneys on the streets of a city so that the latter can not prohibit their operation. *Schlesinger v. Atlanta*, 161 Ga. 148, 163, 129 S. E. 861.

§ 993(26). Park's Code.

See § 993(24).

§§ 993(47-a), 993(47-e). Park's Code.

See § 993(149).

§ 993 (49). Coal, coke, wood and lumber.

Constitutionality.—This section as amended in 1924, is not unconstitutional and void because it violates the commerce clause of the Federal Constitution, or the uniform-tax provision of the State Constitution. *Georgia-Carolina Lumber Co. v. Wright*, 161 Ga. 281, 131 S. E. 173.

§ 993 (54). Foreign corporations.

Effect of Failure to Pay upon Contract.—The failure on the part of the corporation to register with the comptroller-general and pay the tax required by this act, does not render the contracts of the corporation void and unenforceable, since the purpose of the general tax act, as defined by its caption, is merely to raise revenue, and it can not be taken to impliedly nullify contracts made in the absence of compliance with its provisions. *Toole v. Wiregrass Development Co.*, 142 Ga. 57, 82 S. E. 514; *Morris v. Moore*, 143 Ga. 512, 85 S. E. 635; *McLamb v. Phillips*, 34 Ga. App. 210, 129 S. E. 570; *Alston v. New York Contract Purchase Corp.*, 36 Ga. App. 777, 138 S. E. 270.

§ 993(54). Park's Code.

See § 993(49).

§ 993(59). Park's Code.

See § 993(54).

§ 993 (65). Travelling horse traders or gypsies.

Taxation under This Section and Section 993(80). — The plaintiff, a Georgia corporation, having a fixed and permanent place of business, and being a bona fide resident of the State, and having paid the occupation tax imposed by section 993(80), to the tax-collector (who issued his certificate showing the payment, etc.) was not subject to the tax imposed under this section. *Fulton Trading Co. v. Baggett*, 161 Ga. 669, 131 S. E. 358.

§ 993 (69). Travelling, etc., agents of assessment, etc., companies.

Industrial Life Insurance Agents.—Because of section 2507, this section is not applicable to industrial life insurance agents. *Hoover v. Pate*, 162 Ga. 206, 132 S. E. 763.

§ 993(70). Park's Code.

See § 993(65).

§ 993(74). Park's Code.

See § 993(69).

§ 993 (80). Live stock dealers.

As to payment under both this section and section 993(65), see note to section 993(65).

§ 993(84). Park's Code.

See § 993(80).

§ 993 (149). Cigarette and cigar dealers; "wholesale" and "retail" dealer defined.

Number of Sales to Constitute One Dealer.—Where the evidence shows only one sale and no attempt at others or intent to engage in retail trade, it is not sufficient to classify the seller as a dealer under the definition of this section. *Lichtenstein v. State*, 34 Ga. App. 138, 128 S. E. 704.

§ 993 (169). Specific and occupation taxes.—

In addition to the ad valorem tax on real estate and personal property, as required by the Constitution and now provided for by law, the following specific and occupation taxes shall be levied and collected each year after the passage of this Act, beginning in 1928. In all cases in this Act where population controls the amounts of tax or license fee to be paid, the last census report of the Federal government shall govern. Acts 1927, p. 57.

Editor's Note.—All sections under this article, unless otherwise noted, were codified from the Acts of 1927.

§ 993 (170). Poll tax; exemptions.—Upon each and every inhabitant of the State between the ages of twenty-one and sixty years, on the day fixed for the return of property for taxation a poll tax of (\$1.00) one dollar, which shall be for educational purposes in instructing children in the elementary branches of an English education only. Provided, this shall not be demanded of blind persons, nor crippled, maimed, or disabled Confederate veterans relieved of such taxes under and by authority of section 766, volume 1, of the Code of 1895, nor shall this tax be required or demanded of female inhabitants of the state who do not register for voting.

§ 993 (171). Ad valorem tax for sinking fund for retirement of State Bonds.—The governor, by and with the assistance of the Comptroller-General, is authorized and empowered annually to levy and assess a tax on the ad valorem value of the taxable property of this State, such rate as may be sufficient to raise a net amount of \$100,000.00 as a sinking-fund to pay off and retire the valid outstanding bonds of the State as they fall due, as required by article 7, section 14, paragraph 1, of the Constitution. The tax above authorized shall be specially levied and collected, and separate accounts of the same shall be kept by the Treasurer, and the money arising therefrom shall be applied to paying off the valid bonds of the State as they mature. The said amount so received each year shall be applied to paying off and retiring the valid bonds of the State, maturing in their order continuously. All bonds retired under the provisions of this Act shall be cancelled and stamped with the words "sinking funds," by the Treasurer, and filed in his office. In addition to the foregoing levy, the Governor, by and with the assistance of the Comptroller-General, shall also levy and assess such additional rate of tax on the taxable property of this State as may be necessary to meet the appropriations of the General Assembly of Georgia for each succeeding year. The aggregate ad valorem tax levy in any one year not to exceed the tax-rate limit fixed by the Constitution of this State.

§ 993 (172). **Professional tax.**—Upon each and every practitioner of law, medicine, osteopathy, chiropractic, chiropodist, dentistry, and upon each and every veterinary surgeon, optician, optometrist, masseur, public accountant, or embalmer, and upon every civil, mechanical, hydraulic, or electrical engineer, or architect, charging for their services as such, \$15.00, and the validity of their licenses is made contingent upon the payment of the tax herein provided. And no municipal corporation or county authority shall levy or collect an additional tax on the professions, businesses, or occupations enumerated above, which shall be returned to the tax-receiver of the county of his residence by any person engaged therein on the first day of January, and entered by the receiver on the digest of the county.

§ 993(173). **Presidents and officials of corporations.**—Upon the president of each express, telegraph, telephone, railroad, street-railroad, steamboat or navigation company, electric light, gas company, water company, sleeping-car company, palace car-company, building and loan association, and investment and loan company, doing business in this State, \$25.00. Provided, said tax shall not apply to local building and loan associations fostered as a civic undertaking and not conducted for financial gain or profit. In case the president of any of the companies enumerated in the preceding paragraph does not reside in this State, then in each case the general agent, superintendent, or other person or official in charge of the business of such companies, residing in this State, shall be required to pay the tax of \$25.00 hereby imposed; and no municipal corporation, or county authorities shall levy or collect an additional tax on the officials enumerated above, either as a license, tax, or fee. The president or other officials herein named, of the companies enumerated above are required to make a return as such to the tax-receiver of the county of his residence as of January 1st, which return shall be entered on the digest by said receiver.

§ 993(174). **Advertising agents.**—Upon each person, firm, or corporation conducting business of an advertising agency using other means than billboards, \$50.00; upon each person, firm, or corporation conducting the business of advertising by signs painted, pasted, or printed on billboards or other places where space is leased, rented, or sold, in each county where located, one dollar (\$1.00) for each location, and a location is defined to be 75 lineal feet or fractional part thereof; and provided further, that before painting or posting such locations or fractional part thereof, it shall be the duty of the person or persons so advertising to register with the ordinary and tax-collector of said county as required by law, and in case of any increase of advertising said ordinary shall in each instance be notified as to the number of locations.

§ 993(175). **Agencies, collecting, commercial, and mercantile.**—Upon each person, firm, or corporation engaged in business as a collecting, commercial, mercantile, or any other agency of like character, \$200.00 in every county in the State

where they have an office or branch office. Provided that any attorney at law, or firm of lawyers, opening a collection agency, and who shall employ solicitors and collectors, or who shall advertise as collectors or as a collecting agency, shall be liable for said tax regardless of having paid their regular professional tax. Acts 1929, p. 58, § 2.

§ 993(176). **Detective agencies.**—Upon each person, firm, or corporation operating a detective agency or doing detective work for hire or compensation, for each office established in this State, in or near cities or towns of 25,000 or more inhabitants, \$200.00; in or near cities or towns from 10,000 to 25,000 inhabitants, \$50.00; and in or near cities or towns of less than 10,000 inhabitants, \$25.00.

§ 993 (177). **Amusement parks.**— Upon each person, firm, or corporation running, leasing, or operating an amusement park, other than baseball, football, or bicycle parks, hereinafter mentioned, where two or more amusement devices, resorts, or attractions are operated, and an admission fee is charged for any one or more of the exhibits, resorts, or attractions, \$250.00. Provided, this paragraph shall not be construed to exempt or relieve any individual device, resort, amusement, or attraction located in said park from paying any specific or license tax herein imposed.

§ 993(178). **Athletic clubs.**—Upon every Athletic Club, and upon every association or persons giving boxing or sparring or wrestling exhibitions. That the tax herein provided for shall be paid to the tax-collector to the county before opening the doors for any said exhibitions where an admission of fifty cents to one dollar is charged, \$50.00 for each exhibition; where admission charged is \$1.00 to \$1.50, \$100.00; and where the admission charged is \$1.50 and over, \$200.00 for each exhibition. Acts 1929, p. 58, § 1.

§ 993 (179). **Auctioneers.**—Upon each and every auctioneer selling by auction in this State jewelry, junk, furniture and household goods, live stock, farm implements and produce, and real estate, \$100.00 in each county in which he conducts said business. Provided that this section shall not apply to sheriffs and the parties acting as auctioneers for executors, administrators, guardians, and commissioners conducting sales by virtue of the order of any court of this State. Provided that the foregoing provision shall not apply to auctioneers of tobacco or other farm products, nor to attorneys at law conducting sales under power of sale, or other legal sale for their clients.

§ 993 (180). **Automobile and truck dealers.**— Upon every agent of, upon every dealer in, and upon every person soliciting orders for retail sale of automobiles or trucks, not including wholesale dealers or distributors soliciting or canvassing for local dealers, the sum set out below, viz. In each county with a population of less than 20,000, \$25.00; in each county with a population of be-

tween 20,000 and 30,000, \$55.00; in each county with a population of between 30,000 and 50,000, \$85.00; in each county with a population between 50,000 and 75,000, \$110.00; in each county with a population between 75,000 and 100,000, \$165.00; in each county with a population between 100,000 and 150,000, \$220.00; in each county with a population exceeding 150,000, \$275.00. Provided, however, that nothing in this Act shall conflict with the provisions fixing a license upon exclusive dealers in used cars. Such dealer, agent, or solicitor selling or offering for sale automobiles or trucks at retail shall be required to pay one license fee only in each county, so as to provide that all persons soliciting orders, or selling automobiles or trucks at retail, shall pay a license to become a dealer or agent, and such license shall entitle such dealer to sell any makes of new or second-hand automobiles or trucks; and shall entitle said dealers to operate, in connection with said business, a service-station in said county in which said license is paid; any dealer having paid such tax to be allowed any number of employees for the purpose of selling cars within the county wherein such tax has been paid. The service-station under this paragraph includes work done only on the makes of cars sold by the dealer under this tax.

§ 993 (181). Dealers in used cars.—Upon every person, firm, or corporation dealing exclusively in used automobiles or trucks, or second-hand automobiles or trucks, the following sums, viz: In each county with a population of less than 20,000, \$25.00; in each county with a population of over 20,000 and not over 50,000, \$50.00; in each county with a population exceeding 50,000, \$100.00.

§ 993 (182). Automobile tires or accessories; (Wholesale).—Upon every wholesale dealer in automobile tires or automobile accessories of any kind whatsoever, the sum of \$100.00 for each place of business.

§ 993 (183). Automobile tires or accessories (Retail).—Upon every retail dealer in automobile tires or automobile accessories of any kind whatsoever, the sum of \$10.00 for each place of business.

§ 993 (184). Automobile assembling; plants.—Upon every agent or representative of any foreign or non-resident corporation, said agent or representative having an office in this State, operating an automobile assembling-plant, \$300.00 in each county.

§ 993 (185). Automobile truck assembling-plants.—Upon each person, firm, or corporation operating an automobile truck assembling-plant, \$300.00 in each county.

§ 993 (186). Automobile garages.—Upon each person, firm, or corporation carrying on the business of operating garages, either for storage or repairing automobiles, in cities of more than 35,000 inhabitants, \$75.00; in cities between 20,000 and 35,000 inhabitants, \$50.00; in cities between 10,000 and 20,000 inhabitants, \$25.00; in cities

and towns of 1,000 to 10,000 inhabitants, \$15.00; in cities and towns of less than 1,000 inhabitants, \$5.00; and persons operating such garages within one mile of the limits of all incorporated cities, \$5.00.

§ 993(187). Automobile parking-places.—Upon each person, firm, or corporation operating what is commonly known as automobile parking-places, said parking-places being located on vacant lots, in cities or towns with a population of 50,000 or more inhabitants, \$50.00; cities or towns of 25,000 to 50,000, \$25.00; in cities or towns with a population of less than 25,000 inhabitants, \$15.00, for each location where cars are parked for hire.

§ 993 (188). Awning and tent makers.—Upon all awning and tent makers, \$15.00 in each county.

§ 993(189). Bagatelle, billiard, jenny lind, pool or tivoli tables.—Upon each person, firm, or corporation operating for public use, and charging for the use thereof, any billiard, bagatelle, jenny lind, pool, or tivoli tables, the State and County license fee on and after October 1st, 1929, shall be at the rate of \$100.00 for each place of business operating not exceeding six tables, and addition thereto, \$50.00 for each table operated in excess of six tables. Said license fees shall be paid semi-annually, beginning October 1st, 1929, in advance before the beginning of operation. Acts 1929, p. 58, § 3.

§ 993 (190). Ball and racing parks.—Upon each person, firm, or corporation owning, leasing, or operating any park or place where baseball, football, or other similar game is played, or where automobile, motorcycle, horse, or bicycle races or contests are held, and where admission fees are charged, in cities of more than 50,000 inhabitants, or within five miles thereof, \$200.00; in cities with 20,000 to 50,000 inhabitants, or within five miles thereof, \$100.00; in cities with 10,000 to 20,000 inhabitants, or within five miles thereof, \$50.00; in cities or towns of less than 10,000 inhabitants, or within five miles thereof, \$20.00. Provided that this tax shall apply only to those parks and places wherein professional games are played or professional contests are held.

§ 993 (191). Barber-Shops.—Upon every barber-shop the sum of \$5.00 for each chair in use, except that in cities or towns of less than 5,000 inhabitants the amount shall be \$2.50 for each chair in use.

§ 993 (192). Barber supplies.—Upon all agents for barber supplies, \$50.00 for each place of business.

§ 993(193). Beauty parlors.—Upon each beauty parlor or shop or manicure shop, in each and every town and city of this State, with a population of fifty thousand (50,000) or more, the sum of \$25.00; and in each town or city of this State, with a population of twenty-five thousand (25,000)

to fifty thousand (50,000), the sum of \$15.00; and in each and every town and city of this State, with a population of less than twenty-five thousand (25,000), the sum of \$10.00;—said tax to apply to and to be collected from the owner or operator of each and every such place of business. Provided that this tax shall not apply to manicure shops operated in connection with barber-shops. Acts 1929, p. 63 § 10.

§ 993 (194). **Bicycle dealers.** — Upon every bicycle dealer selling or dealing in bicycles, either at wholesale or retail, for themselves or upon commissions or consignments, \$10.00 for each place of business. All unsold bicycles belonging to dealer shall be liable to seizure and sale for payment of such tax.

§ 993 (195). **Bill distributors.** — Upon all bill distributors and parties engaged in the business for profit in towns or cities, \$25.00; provided, this tax is limited to cities of 15,000 population or more.

§ 993(196). **Book agents.**—Upon each agent or canvasser for books, maps, or lithographic prints, in each county in which he shall do business, \$5.00. Provided this shall not apply to bona fide students earning their way through school or college, or to persons selling Bibles only.

§ 993(197). **Bottlers (non-resident).** — Upon each non-resident person, firm, or corporation delivering for sale by truck or trucks any carbonated beverages in this State, \$150.00.

§ 993 (198). **Brokers; stocks and bonds.** — Upon each person, firm, or corporation dealing in bonds or stocks, either exclusively or in connection with other business, the sum of \$100.00 for each town or city in which such persons, firms, or corporations maintain an office

§ 993(199). **Brokers; real estate.**—Upon each person, firm, or corporation engaged in the business of buying or selling real estate on commission, or as agents renting real estate, in cities of 50,000 or more inhabitants, \$50.00; in cities of 25,000 to 50,000 inhabitants, \$30.00; in cities of 10,000 to 25,000 inhabitants, \$20.00; in cities or towns of less than 10,000 inhabitants, \$15.00. And if such person shall engage in auctioneering or selling property at public outcry or by auction sales, he shall also be liable for and required to pay the tax required of real estate auctioneers by paragraph 10 of this section, to wit: \$100.00 in each county.

§ 993 (200). **Burglar-Alarms.** — Upon all burglar alarm companies, or agents therefor, the sum of \$25.00 for each agency or place of business in each county.

§ 993 (201). **Cafes and restaurants.** — Upon every person, firm, or corporation, except hotels, operating any cafe, restaurant, or lunch-room with fifty or more tables, \$100.00; twenty-five to fifty tables, \$50.00; ten to twenty-five tables,

\$25.00; five to ten tables, \$10.00; less than five tables, \$5.00. Provided, that four seats or stools at tables or counters shall be construed on the same basis as a table.

§ 993 (202). **Carbonic acid gas.**—Each person, firm, or corporation engaged in the business of manufacturing or vending soft drinks made of or containing carbonic acid gas or any substitute therefor shall pay, as a privilege license to carry on such business, 4 cents on each pound of carbonic acid gas, or any substitute therefor so used. Provided, that bottled drinks on which this license shall have paid may be resold in original packages without the payment of any further license, under this schedule. Each person, firm, or corporation engaged in such business shall keep accurate books and invoices showing the quantity of carbonic acid gas or any substitute therefor used in such business, and such other information relating to the business as may be required by the Comptroller-General, to enable the State tax officials to check up the returns herein required. At the end of each calendar quarterly period every person, firm, or corporation engaged in such business shall make a report to the Comptroller-General on blanks to be furnished by the Comptroller-General, showing the amount of carbonic acid gas or other substitute therefor consumed during the preceding quarter, and such other information as the Comptroller-General may require, verified by affidavit, and shall with the report remit the license herein provided for each pound of carbonic acid gas or other substitute therefor consumed, as shown by the report, and such remittance shall be paid into the State Treasury. If such report or remittance is not made within fifteen days after the end of the calendar quarter, there shall be added to the sum due for such license for the preceding quarter 10% additional license. The tax officials of the State shall have authority to examine the books and papers of any one engaged in such business, for the purpose of ascertaining the correctness of all reports and remittances. Any person wilfully failing or refusing to make the reports and remittances herein required shall be guilty of a misdemeanor, and any person wilfully making a false affidavit as to any report herein required shall be guilty of perjury.

§ 993(203). **Cars operated for hire.**—Upon each person, firm, or corporation operating or keeping automobiles for hire, whether in connection with a garage or not, a tax according to the following scale, whether in or outside of the corporate limits of any city or town, for each automobile so operated, in or near cities or towns with less than one thousand (1,000) inhabitants, \$5.00; in or near cities with one thousand to five thousand inhabitants, \$10.00; in or near cities or towns with five thousand to fifteen thousand inhabitants, \$15.00; in or near cities or towns with fifteen or thirty thousand inhabitants, \$20.00; in or near cities or towns with thirty thousand to fifty thousand inhabitants, \$25.00; in or near cities or towns with more than fifty thousand inhabitants, \$40.00. Provided that the words "near," as used in this paragraph, is defined to mean within a distance of three miles of the incorporate limits of any town or city. Acts 1929, p. 63, § 11.

§ 993 (204). **Cars operated for hire over fixed routes.**—Upon every person, firm, or corporation operating automobiles for transportation of passengers upon a regular fixed route, commonly known as jitneys, for a uniform fare, for each five passenger car or less, \$15.00; and for each car carrying more than five passengers, \$25.00.

§ 993 (205). **Cars for hire; "Drive-It-Yourself."**—Upon each person, firm, or corporation operating or keeping for hire automobiles, commonly known as "Drive-It-Yourself" business, or automobiles without drivers for hire, \$150.00 for each place of business. Provided that the tax fixed herein shall not exceed \$10.00 for each car operated.

§ 993(206). **Coal and coke.**—Upon each person, firm, or corporation dealing in either coal or coke, whether for themselves or as agents or as brokers, in cities of more than 1,000 inhabitants and not more than 10,000, \$10.00; in cities of more than 10,000 and not more than 20,000 inhabitants, \$50.00; in cities of more than 20,000 inhabitants in one county \$100.00 for each place of business. Provided that where this tax is paid by any person, firm, or corporation, he or it shall be privileged to handle both commodities on the one tax. Acts 1929, p. 60, § 4.

§ 993 (207). **Cemetery companies.**—Upon all cemetery companies, agencies, offices, etc., \$100.00 in each county.

§ 993 (208). **Circuses.**—Upon each circus company or other company or companies giving such exhibition beneath or within a canvas enclosure, advertised in print or parade in any manner whatsoever as a circus, menagerie, hippodrome, spectacle, or show implying circus, the following tax measured by the number of railroad-cars, automobiles, trucks, or wagons used in transporting said circus—railroad cars, automobiles, trucks and wagons hereinafter referred to as cars. A circus requiring more than 80 cars, \$1,000.00 per day; 40 to 80 cars, \$500.00 per day; 20 to 40 cars, \$100.00 per day; 10 to 20 cars, \$50.00 per day; less than 10 cars, \$25.00 per day, for each day it may exhibit in the State of Georgia.

§ 993 (209). **Circus side-shows.**—Upon each side-show accompanying a circus company in any county having a town or city of 5,000 population or more, \$50.00 per day; and in all other counties, \$25.00 per day.

§ 993(210). **Concerts, shows, and exhibitions.**—Upon all concerts, shows, and exhibitions, charging an admission, in or near cities of less than five thousand (5,000) inhabitants, \$25.00; in or near cities of more than five thousand and not more than twenty thousand inhabitants, \$50.00; in or near cities of twenty thousand population and not more than fifty thousand, \$75.00; in or near cities of more than fifty thousand population \$100.00 for each day. Provided that this section shall not apply to exhibitions given by local performers, nor to exhibitions the entire proceeds of which are for charitable, benevolent purposes,

nor to entertainments commonly known as chautauquas. Provided further this section shall not apply to histrionic, dramatic, and operatic performances given in regular licensed theaters and opera houses, but upon each such theater or opera house, in towns of less than 2,000 inhabitants, \$2.50 per month; in cities from 2,000 to 5,000 inhabitants, \$4.00 per month; in cities from 5,000 to 10,000 inhabitants, \$7.00 per month; in cities from 10,000 to 25,000 inhabitants, \$10.00 per month; in cities of over 25,000 inhabitants, \$12.50 per month. Provided that the word "near," as used in this section, shall be defined to mean a distance of three miles from the incorporate limits of any such town or city herein referred to. Acts 1929, p. 64, § 12.

§ 993 (211). **Commercial reporting agencies.**—Upon each person, firm, or corporation engaged in the business of a commercial reporting agency, in each county in the State where they have an office or branch office, \$125.00.

§ 993 (212). **Street carnivals.**—Upon every midway combination of small shows, or street fair or street carnival, the sum of \$25.00 each week or fractional part thereof, for each separate tent, enclosure, or place where an admission fee is charged or collected, either directly or indirectly, to witness or hear any performance, or where anything may be exhibited for admission or ticket; and upon every merry-go-round or flying horse accompanying any midway combination, street fair or street carnival, in each city or town in this State in which it does business, or in each county where they may operate outside of the limits of any city or town in this State, \$25.00. Provided, that should the said midway combination, or any of them specified above, be held in connection with county, district, or State agricultural fairs of this State and under the direction of, and within the grounds at the time of holding said fairs, the whole amount of said tax for said attraction when so held shall be \$25.00 per week or fractional part thereof.

§ 993(213). **Corporations, domestic.**—All corporations incorporated under the laws of Georgia, and doing business therein, except those that are not organized for pecuniary gain or profit and those that neither charge nor contemplate charging the public for services rendered, in addition to all other taxes now required by them by law, are hereby required to pay each year an annual license or occupation tax as specified in the following scale:

Corporations with issued capital stock not exceeding \$10,000, \$10.00.

Corporations with issued capital stock over \$10,000, and not over \$25,000, \$30.00.

Corporations with issued capital stock over \$25,000, and not over \$75,000, \$75.00.

Corporations with issued capital stock over \$75,000, and not over \$100,000, \$100.00.

Corporations with issued capital stock over \$100,000, and not over \$300,000, \$200.00.

Corporations with issued capital stock over \$300,000, and not over \$500,000, \$250.00.

Corporations with issued capital stock over \$500,000 and not over \$750,000, \$300.00.

Corporations with issued capital stock over \$750,000, and not over \$1,000,000, \$500.00.

Corporations with issued capital stock over \$1,000,000, and not over \$2,000,000, \$750.00.

Corporations with issued capital stock over \$2,000,000, and not over \$4,000,000, \$1,000.00.

Corporations with issued capital stock over \$4,000,000, and not over \$6,000,000, \$1,250.00.

Corporations with issued capital stock over \$6,000,000, and not over \$8,000,000, \$1,500.00.

Corporations with issued capital stock over \$8,000,000, and not over \$10,000,000, \$1,750.00.

Corporations with issued capital stock over \$10,000,000, and not over \$12,000,000, \$2,000.00.

Corporations with issued capital stock over \$12,000,000, and not over \$14,000,000, \$2,500.00.

Corporations with issued capital stock over \$14,000,000, and not over \$16,000,000, \$3,000.00.

Corporations with issued capital stock over \$16,000,000, and not over \$18,000,000, \$3,500.00.

Corporations with issued capital stock over \$18,000,000, and not over \$20,000,000, \$4,000.00.

Corporations with issued capital stock over \$20,000,000, and not over \$22,000,000, \$4,500.00.

Corporations with issued capital stock over \$22,000,000, \$5,000.00.

For the purpose of ascertaining the tax hereby imposed, capital stock having no nominal or par value shall be deemed to have such value as is fixed therefor by the Comptroller-General from the information contained in the report to be filed by said corporation, as hereinafter provided for, and from any other information obtained by the Comptroller-General; but in no event shall the value of such stock as so fixed exceed the true value thereof. Acts 1929, p. 85, § 1.

§ 993(214). Corporations, foreign.—All corporations incorporated or organized under the laws of any other State, nation or territory, and doing business in this State, except those companies that are not organized for pecuniary gain or profit and those that neither charge nor contemplate charging the public for services rendered, in addition to all other taxes now required of them by law, are hereby required to pay each year an annual license of occupation tax for the privilege of carrying on its business within this State, as specified in the following scale:

When the amount of the capital stock and surplus employed in the State does not exceed \$10,000, \$10.00.

When the amount of the capital stock and surplus employed in the State is over \$10,000 and not over \$25,000, \$30.00.

When the amount of the capital stock and surplus employed in the State is over \$25,000 and not over \$75,000, \$75.00.

When the amount of the capital stock and surplus employed in the State is over \$75,000 and not over \$100,000, \$100.00.

When the amount of the capital stock and surplus employed in the State is over \$100,000 and not over \$300,000, \$200.00.

When the amount of the capital stock and surplus employed in the State is over \$300,000 and not over \$500,000, \$250.00.

When the amount of the capital stock and surplus employed in the State is over \$500,000 and not over \$750,000, \$300.00.

When the amount of the capital stock and surplus employed in the State is over \$750,000 and not over \$1,000,000, \$500.00.

When the amount of the capital stock and surplus employed in the State is over \$1,000,000 and not over \$2,000,000, \$750.00.

When the amount of the capital stock and surplus employed in the State is over \$2,000,000 and not over \$4,000,000, \$1,000.00.

When the amount of the capital stock and surplus employed in the State is over \$4,000,000 and not over \$6,000,000, \$1,250.00.

When the amount of the capital stock and surplus employed in the State is over \$6,000,000 and not over \$8,000,000, \$1,500.00.

When the amount of the capital stock and surplus employed in the State is over \$8,000,000 and not over \$10,000,000, \$1,750.00.

When the amount of the capital stock and surplus employed in the State is over \$10,000,000 and not over \$12,000,000, \$2,000.00.

When the amount of the capital stock and surplus employed in the State is over \$12,000,000 and not over \$14,000,000, \$2,500.00.

When the amount of the capital stock and surplus employed in the State is over \$14,000,000 and not over \$16,000,000, \$3,000.00.

When the amount of the capital stock and surplus employed in the State is over \$16,000,000 and not over \$18,000,000, \$3,500.00.

When the amount of the capital stock and surplus employed in the State is over \$18,000,000 and not over \$20,000,000, \$4,000.00.

When the amount of the capital stock and surplus employed in the State is over \$20,000,000 and not over \$22,000,000, \$4,500.00.

When the amount of the capital stock and surplus employed in the State is over \$22,000,000, \$5,000.00.

For the purpose of ascertaining the tax hereby imposed, every corporation subject to said tax is deemed to have employed in this State the proportion of its entire outstanding issued capital stock and surplus that its property and assets in this State bears to all its property and assets wherever situated. Capital stock having no nominal or par value shall be deemed to have such value as is fixed therefor by the Comptroller-General from the information contained in the report to be filed by said corporations, as hereinafter provided for, and from any other information obtained by the Comptroller-General; but in no event shall the value of such stock as so fixed exceed the true value thereof. Acts 1929, p. 86, § 1.

§ 993(214a). Payment to Comptroller-General.

—The tax required by the two preceding paragraphs shall be paid to the Comptroller-General of this State, and the payment of said tax shall authorize said corporation to do business in any county in this State, except as otherwise provided by law; and upon payment of said license or occupation tax the Comptroller-General shall furnish to said corporation a certificate or duplicate receipt for each agent in the several counties of this State that the corporation tax herein provided for has been paid. Acts 1929, p. 89, § 1.

§ 993(214b). Payment not relieve from other tax; sections not applied to insurance and sewing

machine companies; returns.—The payment of this tax shall not be constructed so as to relieve the corporation or its agents of any other license or occupation tax whatever. Provided that the three preceding sections shall not apply to insurance companies, or to sewing-machine companies, which are separately taxed by other provisions of this Act. Provided further that all returns by corporations, resident or non-resident, must be made under oath; and when any corporation paying this license or occupation tax requires or demands more than two duplicate certificates for agents, then such corporation shall be required to pay an additional fee of \$1.00 for each duplicate certificate or receipt over and above the first two mentioned. Acts 1929, p. 89, § 2.

§ 993(214c). Annual reports of domestic corporations; form. — Each domestic corporation shall on or before the first day of January in each year make a report to the Comptroller-General, upon forms furnished by him, showing:

- (a) The name of the corporation.
- (b) The location of its principal offices.
- (c) The names of the president, secretary, treasurer, and members of the board of directors, with post-office address of each.
- (d) The date of annual election of officers.
- (e) The amount of authorized capital stock and the par value of each share.
- (f) The amount of capital stock subscribed, the amount of capital stock issued and outstanding, the amount of capital stock paid up, and the amount of surplus and undivided profits.
- (g) The nature and kind of business in which the corporation is engaged, and its place or places of business.
- (h) The change or changes, if any, in the above particulars since the last annual report.
- (i) A balance-sheet as of the last day of the last fiscal or calendar year.
- (j) Such report shall be signed and sworn to before any officer authorized to administer oaths, by the president, vice-president, secretary, treasurer, or general manager of the corporations, and forwarded to the Comptroller-General. Acts 1929, p. 90, § 3.

§ 993(214d). Annual reports of foreign corporations; form. — Each foreign corporation doing business in this State shall, on or before the first day of January in each year, make a report to the Comptroller-General, upon forms furnished by him, showing:

- (a) The name of the corporation and under the law of what State or country organized.
- (b) The location of its principal office.
- (c) The names of the president, secretary, treasurer, and members of the board of directors, with the post-office address of each.
- (d) The date of the annual election of officers.
- (e) The amount of authorized capital stock and the par value of each share.
- (f) The amount of capital stock, subscribed, the amount of capital stock issued, and the amount of paid up capital stock, surplus and undivided profits.
- (g) The nature and kind of business in which the company is engaged and its place or places of business, both within and without the State.

(h) The name and location of its office or offices in this State, and the name and address of the officers or agents of the corporation in charge of its business in this State.

(i) The value of the property owned and used by the company in this State, where situated, and the value of the property owned and used outside of this State and where situated. Provided that in the case of a railroad company located partly in this State and partly in other States, it shall only be necessary for said railroad company to report its total mileage in all States and its total mileage including all side-track in this State, and the tax assessable against it under this Act shall be upon that proportion of its total capital as its mileage including all side-track in this State bears to its total mileage both within and without this State.

(j) The volume of business done by the company in this State.

(k) The volume of business done by the company outside of the State, and where the said business is done.

(l) The change or changes, if any, in the above particulars, made since the last annual report.

(m) A balance-sheet as of the last day of the fiscal or calendar year.

(n) Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, treasurer, superintendent, or managing agent in the State, and forwarded to the Comptroller-General. Acts 1929, p. 90, § 4.

§ 993(214e). Failure to make report; penalty.—In the event any corporation subject to the provisions hereof shall fail to make the reports herein required, when required, said corporation shall by that fact become liable to ten per cent. of the face value of said tax as a penalty, to be collected in the same manner as the tax itself is collected. Provided, however, that the Comptroller-General shall have authority to extend the time either for making said report or paying the tax, for good cause shown to him. Acts 1929, p. 92, § 5.

§ 993(215). Dance halls and dancing instructors.—Upon each person or persons operating dance halls where dancing is permitted or taught for hire, \$100.00 for each place of business. Acts 1929, p. 60, § 5.

§ 993(216). Devices, bowling and ten-pin alleys, cane racks, shooting galleries, etc.—Upon each person, firm, or corporation operating for gain a bowling, box-ball, ten-pin alley or alley of like character, shooting galleries, or booth where firearms are used for firing at a target, and upon persons operating for gain any table, stand, machine, or place for performance of games not prohibited by law, and any rack or booth or place for pitching or throwing rings at canes, knives, or other things of value, or any table or stand for rolling balls for play or for sale or disposition of prizes, for each stand, table, alley, gallery, machine, rack, booth, or other place put in use at each place of business in this State, the sum of \$50.00; provided this paragraph shall include automatic baseball games of all kinds.

§ 993 (217). Directories. — Upon each person, firm, or corporation compiling a city directory or directories of any character, and selling or supplying the same on subscription, the sum of \$25.00 for each county in which a directory is published. The above tax shall not be construed to apply to telephone companies issuing directories for use in the telephone exchanges.

§ 993(218). Dry cleaning. — Upon all persons, firms, or corporations, engaged in dry cleaning, in all towns and cities of this State, of not more than 3,500 inhabitants of \$5.00 for each place of business; and in all towns and cities of this State having a population of more than 3,500 inhabitants, the sum of \$25.00 for each place of business. Provided this paragraph shall not apply to laundries paying the tax imposed by paragraph 62 of this Act, nor to pressing clubs, paying the tax imposed by paragraph 89 of said Act Acts 1929, p. 65, § 13.

§ 993(219). Electrical contractors.—Upon all electrical contractors, \$25.00 for each county.

§ 993(220). Emigrant agents.—Upon each emigrant agent, and upon each employee of such agents, doing business in this State, \$1,000.00 for each county in which such agents or employee may do or offer to do business. Provided, that no emigrant agent or employee shall take from this State or attempt to take from this State any person until after first giving a bond to be accepted and approved by the Commissioner of Commerce and Labor, conditioned to pay any valid debt owing by said person to any citizen of this State.

§ 993(221). Employment agencies. — Upon all employment agencies or bureaus doing business in this State, \$50.00 for each county.

§ 993(222). Fire-Engines and apparatus.—Upon each dealer in fire-engines and apparatus or either of them, \$100.00 for each place of business.

§ 993(223). Fish dealers.—Upon each person, firm, or corporation engaged in the business of packing or shipping oysters, shrimp, or fish, \$50.00 for each county.

§ 993(224). Hotels.—Upon every person, firm, or corporation operating a hotel, in counties of over 30,000 inhabitants, a tax of \$1.00 for each sleeping-room per annum, and in counties of less than 30,000 inhabitants, 50 cents per annum for each sleeping-room.

§ 993(225). Horse-Traders (traveling) or gypsies.—Upon each company of traveling horse-traders, or traveling gypsies, or traveling companies or other transients, traveling persons or firms, engaged in trading or selling merchandise or live stock of any kind, or clairvoyant, or persons engaged in fortune-telling, phrenology, or palmistry, \$250.00, to be collected by the tax-collector in each county and distributed as follows: To the county where collected \$125.00; to the

State \$125.00. This tax to be collected in each county where they carry on either kind of business herein mentioned. This tax shall apply to any person, firm, or corporation, who themselves or by their agents travel through the State carrying live stock and carrying with them cooking utensils, and live in tents or travel in covered wagons and automobiles, and who may be a resident of this State, or who reside without the state, and who are commonly called traveling horse-traders and gypsies, and such persons or corporations shall be liable to pay this tax. Such tax shall constitute a lien on any live stock owned by such traveling persons or firms. Provided that no Confederate soldier, indigent, or any other person, or corporation shall be exempted from the tax provided under this section. Provided that nothing herein shall prevent any municipality, by proper ordinance, from prohibiting the practice of fortune-telling, phrenology, palmistry, or like practices within its limits. Acts 1929, p. 60, § 6.

§ 993(226). Ice cream dealers. — Upon each person, firm, or corporation manufacturing ice cream or selling same at wholesale, in or near cities of more than 50,000 inhabitants, \$100.00; in or near cities from 20,000 to 50,000 inhabitants, \$75.00; in or near cities from 10,000 to 20,000 inhabitants, \$50.00; and in or near cities of less than 10,000 inhabitants, \$10.00. Provided that the word "near," as used in this section, is defined to mean within a radius of three miles of the incorporate limits of cities in this section referred to. Acts 1929, p. 65, § 14.

§ 993(227). Insurance agents.—(a) Upon each and every local insurance agent, and upon each and every solicitor or subagent, for any resident or non-resident life, fire, marine, accident, casualty, liability, indemnity, fidelity, bonding or surety insurance company doing business in this State, \$10.00, payable to the Insurance Commissioner, for each county in which said agent, solicitor, or subagent shall transact or solicit business.

(b) Upon each and every local insurance agent, and upon each and every solicitor or subagent, for any resident or non-resident assessment life-insurance company, or industrial life, accident, or sick-benefit insurance company, live-stock insurance company or fire and storm co-operative assessment fire-insurance companies doing business in this State, \$10.00 payable to the Insurance Commissioner, for each county in which said agent, solicitor, or subagent shall transact or solicit business.

(c) Upon each and every general, special, traveling, state, or district agent, or manager, or assistant manager, by whatever name he may be designated in his contract, of any resident or non-resident life, fire, marine, accident, casualty, liability, indemnity, fidelity, bonding or surety insurance company, doing business in this State, \$100.00 payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State without the payment of an additional tax.

(d) Upon each and every general, special, traveling, state, or district agent, manager, district manager, assistant manager, superintendent, or assistant superintendent, by whatever name he may be

designated in his contract, of any resident or non-resident assessment life-insurance company, or industrial life, accident, or sick-benefit insurance company, or live-stock insurance company, doing business in this State, \$100.00 payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State without the payment of an additional tax.

(e) Upon all adjustment bureaus employing adjusters, a tax of \$50.00 for each person who adjusts any loss, said tax payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State.

(f) Upon each and every person not connected with an adjustment bureau, who adjusts insurance losses, \$50.00 payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State. Provided, that this tax shall not apply to local insurance agents who adjust losses without remuneration.

(g) The occupation taxes imposed by this paragraph must be paid in advance by said agents to the Insurance Commissioner, for the fiscal year for which they are levied, before said agent shall be authorized to act as agent for any insurance company. Provided, that railroad-ticket agents selling accident tickets shall not be deemed insurance agents in the sense of this paragraph.

§ 993(228). **Junk-dealer.** — Upon each person, firm, or corporation engaged in the business of dealing in junk in or near cities of over 50,000 inhabitants \$100.00; in or near cities of from 10,000 to 50,000 inhabitants, \$50.00; in or near cities of from 3,000 to 10,000 inhabitants, \$25.00; in cities or towns under 3,000 or within ten miles thereof, \$3.00. Each junk dealer, his clerk, agent, or employee, shall keep a book, open to inspection, in which he shall make entries of all railroad iron, brass, pieces of machinery, plumbing materials, unused farm implements, automobile parts, fixtures, or accessories purchased by him, together with the name of the party from whom purchased; and upon failure to keep such book or record and produce it on demand, the said dealer shall forfeit his license. Provided the words, "near," as used in this section, is defined to mean within a radius of the three miles of the incorporate limits of the cities and towns referred to in this section. Acts 1929, p. 66, § 15.

§ 993 (229). **Legerdemain and sleight of hand.**— Upon each exhibition of feats of legerdemain or sleight of hand, or other exhibition and entertainment of like kind, \$25.00 in each county.

§ 993 (230). **Legislative agents.** — Upon each person registered under the Act of the General Assembly approved August 11, 1911 (see Acts 1911, page 151), the sum of \$250.00 for every person, firm, or corporation represented by said agent.

§ 993 (231). **Laundries.** — Upon each person, firm, or corporation operating a laundry or dyeing establishment, \$100.00 if employing ten or more persons; \$50.00 if employing five and not

more than ten persons; \$25.00, if not employing more than five persons. Provided that where any person, firm, or corporation owns or operates more than one laundry, this tax shall be paid for each such laundry, according to the scale of tax herein provided, that is to say, the tax shall be paid for each operation of each such laundry or dyeing establishment. Acts 1929, § 16.

§ 993 (232). **Lighting systems.** — Upon each person, firm, or corporation selling, whether as manufacturer, agent, or dealer in any lighting system, whether gas, gasoline, or electrical, \$25.00 in each county.

§ 993 (233). **Lightning-rods.** — Upon each person, firm, or corporation who may contract for or engage in the business of fitting up or erecting lightning-rods in this State, the sum of \$10.00 for each county in which he may contract for, or erect, or put in place any lightning-rod or rods upon any structure or building therein; and it shall be the duty of the tax-collector to whom the tax is paid to issue the person paying such tax a license receipt showing such payment. When a license for erecting a certain brand or make or rod has been issued for a county, additional licenses for erecting the same brand or make shall be issued upon the payment of \$5.00 each.

§ 993(234). **Live stock dealers.** — Upon each person, firm, or corporation dealing in live stock, having a fixed place of business in or near cities of more than 50,000 inhabitants, \$25.00; in or near cities of from 10,000 to 50,000 inhabitants, \$15.00; in or near cities or towns of less than 10,000 inhabitants, \$10.00 for each place of business. Provided the word "near," as used in this section, is defined to mean within a radius of three miles of the incorporate limits of any town or city in said section mentioned. Acts 1929, p. 66, § 17.

§ 993(235). **Lumber dealers.**—Upon every person, firm, or corporation engaged in the manufacture of lumber products of any character or dealing in lumber or lumber products, whether for themselves or as agents or brokers, in or near cities of 1,000 inhabitants and not more than 10,000, \$10.00; in or near cities of more than 10,000 and not more than 2,000 inhabitants, \$50.00; in or near cities of more than 20,000 inhabitants \$100.00 for each place of business. Provided the word "near" as used in this section is defined to mean within a radius of three miles of the incorporate limits of the cities and/or towns in this paragraph referred to. Acts 1929, p. 67, § 18.

The use of the word "near" in making the classification subjecting certain persons and corporations designated by the act as "in or near cities," as contained in this section, necessarily leaves to the tax officer the discretion of determining in many instances that some may be liable and others may not be liable, depending entirely upon the circumstances of each particular case; and for this reason the tax imposed by the section, is invalid and unenforceable in so far as the provisions of the paragraph relate to persons or corporations "near" cities, but outside the definite limit of one mile stated in the act. Case-Fowler Lumber Co. v. Winslett, 163 Ga. 808, 149 S. E. 211.

§ 993 (236). **Machines (Store cash registers).**—

Upon each manufacturer or wholesale dealer in, or agent for the sale of, any cash or account register, \$100.00 for each place of business in this State.

§ 993 (237). Machines (Weighing or calculating). — Upon each manufacturer or wholesale or retail dealer in, or agent for the manufacturer of, any weighing scale or scales for calculating weight or prices of commodities, \$25.00 for each place of business in this State.

§ 993 (238). Machines (Adding machines). — Upon every manufacturer of, or wholesaler or retail dealer in, or agent for the sale of any adding or calculating machine, check-protector, and domestic ice machines retailing for more than ten dollars, \$25.00 for each place of business in counties of 20,000 population or under; \$50.00 in counties of a population of over 20,000 and under 50,000; and \$100.00 in counties of over 50,000, for each place of business in this State.

§ 993 (239). Machines (Typewriters). — Upon every manufacturer of, or wholesaler or retail dealer in, or agent for the sale of any typewriter or typewriting machine, \$25.00 for each place of business in counties of 20,000 population or under; \$50.00 in counties of over 20,000 population and under 50,000; \$100.00 in counties of over 50,000; this tax to be paid for each place of business in the various counties of this State.

§ 993 (240). Machines (Slot). — Upon every machine, punchboard, or other device, operated, used, or kept in this State, wherein is kept any article to be purchased by depositing therein or paid therefor any coin or thing of value, and for which may be had any article of merchandise whatsoever, where there is no chance incurred by reason thereof, and where the deposit of coin or other thing of value does not exceed one cent per operation, \$2.00 for each machine, punchboard, or other device for each county where kept, set up, used, or operated.

(b). Upon each slot-machine wherein may be seen any picture or music may be heard by depositing in said machine any coin or thing of value, and each weighing machine or scale, and every machine making stencils by use of contrivances operated by slot, wherein coin or other thing of value is to be deposited or used, the deposit of coin or other thing of value not exceeding one cent per operation, \$1.00 for each machine where kept, set up, used, or operated. On all other machines described in this paragraph, charging more than one cent per operation, \$5.00 for each machine where kept, set up, used, or operated. Provided further, that no machine described in this paragraph shall be subject to more than one tax.

§ 993 (241). Machinery and equipment.—Upon every manufacturer of reaping, mowing, binding, or thrashing machines, gas, electrical, or oil engines, agricultural machinery propelled by gas, and road-building machinery propelled by gas or oil, culverts, road-machines and road-graders, selling or dealing in such machinery by itself or

its agents in this State, and all wholesale and retail dealers in the above-mentioned machinery, selling such machinery manufactured by companies that have not paid the tax thereon named, shall pay \$100.00 annually to the Comptroller-General on the first of January of each year or at the time of commencement of business, same to be known as a license fee for the privilege of doing business in this State. All companies and others paying this license fee shall, at the time of payment, furnish the Comptroller-General with a list of all agents authorized to sell the aforesaid machinery of their manufacture, or under their control, and shall pay to said Comptroller-General the sum of \$10.00 for each of said agents, for the fiscal year or fractional part thereof, for each county in which the said agents may do business. Upon the payment of \$10.00 the Comptroller-General shall issue to each of said agents a certificate of authority to transact business in this State. Before commencing business in this State all such agents shall be required to register their names with the Ordinaries of those counties in which they intend to do business, and shall exhibit to said ordinaries their license from the Comptroller-General; wholesale and retail dealers in the above-mentioned machinery shall be required to pay tax provided herein for manufacturers of the above machines sold by them, unless said manufacturers, have paid the tax required by this Act. All unsold machinery belonging to manufacturers, dealers, or other agents, or in their possession or the possession of others, shall be liable to seizure and sale for the payment of such fees, license, or tax. None of the provisions of this paragraph shall apply to licensed auctioneers selling second-hand machinery, or to officers of the law under legal process, or to merchants buying or selling said machinery on which a license tax has been paid as herein provided, and who keep the same and sell and deliver them from their place of business. Any person who shall violate the provisions of this paragraph shall be liable to prosecution for a misdemeanor, and on conviction shall be punished as prescribed in section 1065, volume 2 of the Code of 1910.

§ 993(242). Merry-Go-Rounds. — Upon the owner, manager, keeper, or lessee of any merry-go-round or flying horses, or flying swings, or human roulettes, or scenic devices run by machinery, or of an elevated railway or scenic railway, similar contrivance kept for gain, either directly or indirectly, for each place of business in this State, and for each place where operated, in counties in which there is a city of 50,000 or more inhabitants, \$50.00; in all counties in which there are cities between 10,000 and 50,000 inhabitants, \$30.00; in counties having a city between 5,000 and 10,000 inhabitants, \$20.00; in all other counties, \$10.00.

§ 993 (243). Monument dealers. — Upon each person, firm, or corporation selling monuments or tombstones, \$25.00 in each county in which they shall have a place of business.

§ 993 (244). Motor-Buses.—Upon every person, firm, or corporation, operating a motor-bus for the transportation of passengers upon a regular or

fixed route, \$25.00 for each bus of a passenger capacity of seven or less, and on each bus of more than said capacity the sum of \$50.00; provided they shall be exempt from local municipal license tax; provided further, that this section shall not apply to passenger buses transporting school children exclusively.

§ 993(245). Motor-Trucks and trailers.—Upon every person, firm, or corporation engaged in the operation of motor-trucks or trailers for the transportation of freight for hire, \$25.00 for each truck or trailer. Provided this section shall not apply to persons, firms, or corporations hauling farm produce, live stock, and fertilizer exclusively. Provided that the width of load of trucks and trailers shall not be more than eight feet. Provided further that said Act shall not apply to motor-trucks and trailers used exclusively in hauling of lumber not in competition with common carriers. Provided nothing in this section shall be construed to impose a tax upon trailers used by any person, firm, or corporation engaged in transportation of lumber, timber, piling, cross-ties, or poles, not for hire, but used by such person, firm, or corporation as an incident to their business. Acts 1929, p. 73, § 29.

§ 993 (246). Motorcycle dealers.—Upon every person, firm, or corporation selling or dealing in motorcycles or motor attachments for bicycles, whether in connection with the business of selling bicycles or automobiles or otherwise \$25.00 for each place of business.

§ 993(247). Moving pictures.—Upon each and every electric show or exhibition of moving pictures, or illustrated songs, except where given for educational purposes, for each place of business in or near cities or towns of less than 2,000 inhabitants, \$2.00 per month; in or near cities or towns of from 2,000 to 5,000 inhabitants, \$3.00 per month; in or near cities of from 5,000 to 10,000 inhabitants, \$7.00 per month; in or near cities of from 10,000 to 25,000 inhabitants, \$10.00 per month; in or near cities of from 25,000 to 50,000 inhabitants, \$12.50 per month; in cities of 50,000 or more inhabitants, \$25.00 per month, except in suburbs of cities of more than 50,000 inhabitants, where the tax shall be \$12.50 per month. Provided the word "near," as used in this paragraph, is defined to mean within a radius of three miles of the incorporate limits of any such cities or towns referred to in this paragraph. Acts 1929, p. 67, § 19.

§ 993 (248). Motion picture supply houses. — Upon all motion-picture supply-houses, or film-distributing agencies, \$100.00 for each place of business.

§ 993(249). Musical instruments. Graphophones, organs, phonographs, pianos, and victrolas, radios or radio supplies.—Upon each person, firm, or corporation engaged in the business of selling or renting, as agents or dealers, any of the above similar instruments, in or near cities of more than 50,000 inhabitants, \$100.00; in or near cities of from 25,000 to 50,000 inhabitants, \$50.00; in

or near cities of from 10,000 to 25,000 inhabitants, \$25.00; in or near cities or towns of less than 10,000 inhabitants, \$10.00 for each place of business. Provided the word "near," as used in this section, is defined to mean within a radius of three miles of the incorporate limits of said city or town referred to in this paragraph. Acts 1929, p. 68, § 20.

§ 993 (250). News dealers.—Upon each person, firm, or corporation carrying on the business of selling books, magazines, papers, fruits, confections, or other merchandise on the railroad-trains in this State, \$500.00. No county or municipality shall have authority to levy any additional tax for the privilege of carrying on said business.

§ 993(251). Packing-houses, brokers, and butcher plants. — Upon every packing-house, butcher plant, broker, or brokers, and upon every person, persons, firm, or corporation acting as agent for any packing-house or corporation dealing in packing-house products or goods, doing business in this State, for each place of business in each county having a city situated therein with a population of 30,000 or more, \$300.00; for each place of business in each county with a population of from 15,000 to 30,000, \$150.00; for each place of business in each county with a population of from 5,000 to 15,000, \$50.00; for each place of business in each county with a population of less than 5,000, \$25.00. Acts 1929, p. 61, § 7.

§ 993 (252). Patent rights.—Upon each person, firm, or corporation selling patent rights in Georgia, the sum of \$50.00 for each county in which said business is carried on.

§ 993(253). Selling in baseball parks. — Upon each person, firm, or corporation, in cities having a population of 40,000 or more inhabitants, carrying on the business of selling papers, fruits, drinks, or other articles of merchandise in baseball-parks, \$100.00.

§ 993 (254). Pawnbrokers.—Upon each person, firm, or corporation carrying on the business of pawnbrokers, for each place of business in this State, \$200.00. If any pawnbroker shall sell, or offer for sale, or expose in his place of business any pistol, pistol or rifle cartridges, dirk, bowie-knife, or metal knucks, whether sold as unredeemed pledges or otherwise, he shall also be held subject to and required to pay the license-tax required of the dealers in such articles by section 993 (257).

§ 993 (255). Peddlers.—Upon every peddler or traveling vendor of any patent or proprietary medicine or remedies, or appliances of any kind, or special nostrum, or jewelry, or stationery, or drugs, or soap, or of any kind of merchandise or commodity whatsoever (whether herein enumerated or not), peddling or selling any such goods or articles or other merchandise, in each county where the same or any of them are peddled, sold or offered for sale, \$50.00. Provided, that no vendor or peddler of perishable farm products including products of grove and orchard, shall

be required under this paragraph or any other of this act, to pay any license fee or tax, State, County or municipal. And provided further, that any person qualifying under this paragraph and under sections 1886 et sequitur of Civil Code of Georgia, 1910, to peddle, shall be entitled to one helper only to assist him in carrying on his business as a peddler.

(b) Upon every peddler of stoves or ranges for cooking purposes or clocks or albums, or picture-frames, for each county wherein he may sell or offer for sale either of said articles, \$25.00.

(c) Upon any traveling vendor of any patent churn, or patented fence, or patented agricultural implements, or tools, or other patented articles, \$25.00 for each county in which he may sell or offer to sell either of the enumerated articles.

(d) Upon every traveling vendor using boats, barges, or other water-craft for the purpose of selling goods of any kind, not prohibited by law, on the rivers or waters within the limits of this State, for each county where he may sell such wares, goods, or merchandise, \$50.00. The tax shall be a lien upon the boat, barge, or other water-craft, and its contents, without regard to the ownership thereof.

(e) The term "peddler" is hereby defined as follows, to wit: Any person carrying goods, wares or merchandise of any description with him, other than farm, orchard or grove products, either in a pack or vehicle of any character whatever, and who makes delivery of goods ordered on the day of taking orders, shall be held and deemed a peddler, whether such sales are for consumption or resale. Provided that the definition of the term peddler as herein used shall not embrace servants, agents, and/or employees of bona fide wholesalers or distributors of goods, wares, produce, and merchandise to retailers thereof, only.

§ 993(256). Pictures and picture-frames.—Upon every person, firm, or corporation who, in person or through its agents, sells and delivers photographs or pictures of any character, or picture-frames, whether they make charge for such frames or not, \$15.00 in each county in which this business is done. Provided, this shall not apply to regular merchants dealing in such goods at their usual place of business.

§ 993(257). Pistols. — Upon each and every dealer in pistols, or who deals in pistol cartridges, or rifle cartridges, dirks, bowie-knives, or metal-knucks, for each place of business in this State, in or near towns or cities of 10,000 or less inhabitants, \$50.00; in or near cities of over 10,000 inhabitants, \$100.00. Provided further that no person shall be exempted from the payment of this tax. Provided further the word "near," as used in this section or paragraph, shall be and is defined to mean within a radius of three miles of the incorporate limits of said towns or cities in this section referred to. All dealers in toy pistols of every kind doing business in this State shall pay a tax of five hundred dollars. Acts 1929, p. 68, § 21.

§ 993 (258). Playing-Cards.—Upon each dealer in playing-cards, \$10.00 for each place of business.

§ 993 (259). Photographers. — Upon every daguerrean, ambrotype, photographic, and similar artists carrying on the business of making pictures, \$10.00 in each county.

§ 993(260). Pressing-clubs and pressing and cleaning business.—Upon each person, firm, or corporation operating a pressing-club, and/or upon each person, firm, or corporation engaging in the business of pressing and cleaning clothes, \$5.00 for each place of business. Provided that if each such person, firm, or corporation, shall engage in any dry-cleaning business, he shall, in addition, pay the sum provided for in paragraph 993(218) hereof. Acts 1929, p. 69, § 22.

§ 993 (261). Practioners (Itinerant). — Upon every intinerant doctor, dentist, optician, optometrist, veterinary surgeon, osteopath, chiropractor, or specialist of any kind, doing business in this State, \$25.00 for each county in which they may practice or do business. Provided, that if any one of said itinerant specialists shall peddle or sell any drug, medicine, remedy, appliance, spectacles, glasses, or other goods in connection with the practice of his profession, he or they shall be subject to the tax required of peddlers, or traveling vendors of patent or proprietary medicine, nostrums, etc., by section 993(225), \$50.00 in each county where they may offer to sell such articles. Provided further, that the provisions of this paragraph shall not apply to persons whose fixed place of business is in any county of this State, and who have paid the professional tax required by section 993(172).

§ 993(262). Rinks (Skating). — Upon the owner, manager, keeper, or lessee of any skating-rink in this State, where any fee or charge is made for admission, for the use of skates or skating, in counties having a population of more than 100,000, the sum of \$100.00; in counties having a population of 50,000 and not over 100,000, the sum of \$50.00; in counties having a population less than 50,000, the sum of \$25.00 for each place of business.

§ 993(263). Salary and wage buyers.—Upon each person, firm, or corporation or partnership buying salary or wage accounts and all negotiable papers, \$100.00 for each office or place of business maintained.

§ 993(264). Safes and vaults.—Upon each person, firm, or corporation or agent thereof selling safes or vaults, or vault doors or other vault fixtures, \$100.00 for each place of business.

§ 993(265). Sanitariums.—Upon hospitals and sanitariums, or institutions of like character, whether incorporated or not, conducted for gain, in or near cities of more than 20,000 population, \$100.00. In or near cities or towns of less than 20,000 population, \$15.00. Provided that the above tax shall not apply to public hospitals maintained by municipal corporations for charitable purposes only. Provided further the word "near" as used in the above stated section, is

defined to mean within a radius of five miles of the incorporate limits of the towns or cities of paragraph referred to. Acts 1929, p. 69, § 23.

§ 993(266). Shows (Dog and pony).—Upon each dog, pony, or horse show, where the entire show is exclusively an exhibition of trained dogs, ponies, or horses and monkeys, or a combination of any of them, beneath a tent, canvas, or enclosure, where an admission fee of fifteen cents or more is charged, the sum of \$50.00 for each day it may exhibit; and upon such shows with an admission fee of less than fifteen cents, the sum of \$30.00 for each day it may exhibit in this State.

§ 993(267). Shows (vaudeville). — Upon each person, firm, or corporation operating vaudeville shows which are given under tents or places other than regular licensed theatres, in or near cities or towns of less than 1,000 inhabitants, \$2.50 per week; in or near cities or towns of 1,000 to 5,000 inhabitants, \$5.00 per week; in or near cities or towns of 5,000 to 10,000 inhabitants, \$7.50 per week; in or near cities or towns of 10,000 to 25,000 inhabitants, \$10.00 per week; in or near cities or towns of 25,000 to 50,000 inhabitants, \$20.00 per week; in or near cities or towns of more than 50,000 inhabitants, \$50.00 per week. Provided the word "near" as used in the foregoing section is defined to mean within a radius of five miles of the incorporate limits of the towns and cities therein referred to. Acts 1929 p. 70, § 24.

§ 993(268). Sprinklers (Automatic).—Upon all automatic sprinkler companies, or agents therefor, the sum of \$25.00 for each agency or place of business in each county.

§ 993 (269). Soda-Fountains.—Upon each person, firm, or corporation running or operating soda-fountains in this State, having one draught arm or similar device used in drawing carbonated water, \$5.00; and for each additional arm or device, \$5.00.

§ 993 (270). Soft-Drink syrups.—Upon all persons and companies carrying on, in this State, the business of manufacturing or selling, by wholesale or retail, or distributing from any depot, car, or warehouse or agency, any carbonated waters or syrups or other articles to be used in carbonated water, or intended to be fixed with or blended with carbonated water to be sold as soft drinks (not including imitations of beer, wine, whiskey, or other intoxicating liquor), as an occupation tax for the privilege of carrying on said business, an amount payable at the end of each quarter, equal to one half one per cent ($\frac{1}{2}\%$) of the gross receipts from said business for said quarter in this State. Within three days from the end of each quarter of the calendar year each person or company engaged in said kind of business shall make returns under oath to the Comptroller-General of this State, showing the amount of said gross receipts, with a detailed statement of the parties from whom said receipts are received. In case of a corporation, the return shall be made under oath by the president, if a resident of this

State; and if the president is not such resident, by the officer or person in charge of the business of said corporation in this State. Upon failure of any person required by this paragraph to make such returns within ten days after the expiration of such quarter, he shall be guilty of a misdemeanor, and shall be liable to prosecution and be punished as now provided in cases of misdemeanor. Upon the making of such returns, the person or company liable to said tax shall pay the same to the Comptroller-General, and upon failure to pay the same the Comptroller-General shall issue an execution for said tax against the property of the person or company liable to said tax. If no returns be made or if the Comptroller-General believes said returns are false, the Comptroller-General shall ascertain the amount of said gross receipts from the best information in his power, and assess the tax according, after giving the company or person liable to said tax at least five day's notice of the time of assessing said tax, and issue his execution accordingly against the person or corporation carrying on said business. Any person, company, or agent carrying on any kind of business specified in this paragraph, after failure to pay the tax herein levied for any preceding quarter during which he or it was liable to tax, shall be guilty of a misdemeanor. It is hereby enacted that all of said taxes received or collected under this paragraph shall be paid into the State treasury. It is also enacted that any person or company paying the tax herein levied shall be relieved of any and all occupation tax or license fees to the State under existing laws on or for the kind of business specified in this paragraph. Provided, however, that said tax shall be collected upon said syrup or carbonated water only once, and shall be paid by the wholesale dealer in said syrup if sold within the confines of this State by such wholesale dealer; and if said syrup or carbonated water shall be purchased by the retail dealer without the limits of this State and shall be shipped to a point within the limits of this State, the same shall be taxed in the hands of such retail dealer, and for the purposes of this tax the price paid for such syrup or carbonated water shall determine the receipts for the same.

§ 993(271). Swimming-pools.—Upon each and every person, firm, or corporation operating a swimming-pool where admission fees are charged, or upon persons, firms, or corporations keeping and renting bathing-suits for hire, \$20.00 in counties of over 50,000 population; and \$10.00 in counties of under 50,000 population; upon persons, firms or corporations conducting or operating a bathing resort in or near the ocean and ocean and gulf front of this State, for hire, the sum of \$200.00 in each county where such bathing resort is located. Provided the word "near" as used in the above-stated section, is defined to mean within two miles of the shore line of any ocean and/or gulf referred to in said section. Acts 1929, p. 70, § 25.

§ 993 (272). Toll-Bridges and ferries.—Upon all persons or corporations operating ferries, \$15.00. Upon all persons or corporations operating toll-bridges, \$100.00, said tax to be paid to the

tax-collector of the county in which the bridge is located or situated. Provided, that this tax shall not be required of any ferry or toll-bridge the receipts from which do not amount to more than \$500.00 per annum. And provided further, that the provisions of this paragraph shall apply to line bridges as well as bridges wholly within the confines of this State.

§ 993 (273). Trucks (Gasoline or Oil).—Upon each person, firm, or corporation selling oil or gasoline from a wagon or truck, \$10.00 for each wagon or truck.

§ 993(274). Undertakers.—Upon each person, firm, or corporation whose business is that of burying the dead and charging for same, commonly known as undertakers in or within a radius of fifteen miles of the corporate or town limits of cities of more than 50,000 inhabitants, \$200.00; in or near cities from 10,000 to 50,000 inhabitants, \$100.00; in or near cities from 5,000 to 10,000 inhabitants, \$50.00; in or near cities or towns of from 2,500 to 5,000 inhabitants, \$20.00; in or near towns of less than 2,500 inhabitants, \$10.00 for each place of business. Provided the word "near" as used in the above stated section, is defined to mean within three miles of the incorporate limits of any town or city referred to in said paragraph. Acts 1929, p. 71, § 26.

§ 993 (275). Warehouses (Cotton).—Upon each person, firm, or corporation operating a warehouse or yard for the storage and handling of cotton for compensation, license-tax is as follows: Where 500 to 5,000 bales are handled in one year, \$10.00; where 5,000 to 10,000 bales are handled in one year, \$25.00; where 10,000 to 20,000 bales are handled in one year, \$50.00; where 20,000 to 30,000 bales are handled in one year, \$100.00; where more than 30,000 bales are handled in one year, \$200.00.

§ 993 (276). Warehouse (Merchandise, etc).—Upon each person, firm, or corporation operating a warehouse or yard for storage of goods, wares, or merchandise and farm products other than cotton, and charging for the same, \$25.00. Provided, that any warehouse that pays taxes as provided in section 993 (275) shall not be subject to the tax required by this paragraph.

§ 993 (277). Wood dealers.—Any person, firm, or corporation dealing in wood shall pay a tax of \$10.00 for each place of business.

§ 993 (278). Plumbing, heating, steam-fitting and tinning contractors.—Upon every plumbing, heating, steam-fitting and tinning contractor, in counties having a city with a population over 50,000 the sum of \$25.00; in counties having a city with a population less than 50,000 and over 15,000, the sum of \$15.00; in counties having a city or towns less than 15,000 the sum of \$10.00.

§ 993(279). Malt extracts and malt products.—Upon all persons and companies carrying on in this State the business of manufacturing or selling, by wholesale or retail, any and all malt

syrops, as an occupation tax for the privilege of carrying on said business an amount payable at the end of each quarter, equal to one per cent. of the gross receipts from said business in this State. Within three days from the end of each quarter of the calendar year each person or company engaged in said kind of business shall make returns under oath to the Comptroller-General of this State, showing the amount of said gross receipts, with a detailed statement of the parties from whom said receipts are received. Provided further that this tax shall not apply to malt syrups not flavored with hops and sold by the manufacturers of said products to bakers in bake shops for use in the manufacture of bread, nor to malt syrup not flavored with hops and sold by manufacturers of said products to the operators of textile mills for use in the bleaching of cotton cloth; and provided further that said malt syrups shall not be additionally taxed under § 993(270). Acts 1929, p. 72, § 28.

§ 993(280). Chain Stores.—Under the police powers of this State, the business of conducting chain stores and/or a chain of stores, for the selling of any kind of merchandise, hereby is classified as a business tending to foster monopoly; and there is hereby levied upon each and every such person, firm, or corporation, owning, operating, maintaining, or controlling a chain of stores, consisting of more than five stores, the sum of \$50.00 for each store. "Chain of Stores" as used herein shall mean and include five or more stores, owned, operated, maintained, or controlled by the same firm, person, or corporation, in which goods, wares, or merchandise of any kind are sold at retail in the State of Georgia. Provided that the provisions of this paragraph shall apply to wholesale chain stores, and/or chains of stores as well as to retail chain stores; and provided further that this tax shall apply to each and every chain of stores as herein defined, and said tax shall be paid by each store in any given chain, whether the same be owned, operated, and controlled by any person, firm, or corporation, or by any holding company or trustee, who holds the title and/or beneficial interest in the same, or in any units of any chain of stores, to and for the use and benefit of the owners of the entire chain of stores, or of any unit or units of the same. Acts 1929, p. 71, § 27.

§ 993 (281). Fish and sea food peddlers; non-resident.—Upon each non-resident firm or individual engaged in peddling fish, oysters, shrimp, or other sea food, ten (\$10.00) dollars for each vehicle operated in each county in the State.

§ 993 (282). Dogs.—All dogs are hereby made personal property, and shall be given in and taxed as other property of this State is given in and taxed, such tax to be enforced by levy and sale as other taxes are collected, and not to interfere with the imposition and collection of any municipal taxes on dogs, whether such dog or dogs be owned by the taxpayer, his wife or minor children.

§ 993 (283). Sewing-Machines. —Upon every

sewing-machine [company] selling or dealing in sewing machines by itself or its agents in this State, and all wholesale and retail dealers in sewing-machines, selling machines manufactured by companies that have not paid the tax herein, \$400.00 for each fiscal year or fraction thereof, to be paid to the Comptroller-General at the time of commencement of business, and said companies or dealers shall furnish the Comptroller-General with a list of agents authorized to sell machines of their manufacture or under their control, and shall pay to said Comptroller-General the sum of \$10.00 for each of said agents for the fiscal year or fractional part thereof, for each county in which said agents do business for said company. Upon the payment of said additional sum the Comptroller-General shall issue to each of said agents a certificate of authority to transact business in this State. Before doing business under this Act, all sewing-machine agents shall be required to register their names with the ordinaries of those counties in which they intend to operate, and exhibit to said ordinaries their license from the Comptroller-General, and to keep such license posted on their vehicles, or at their place of business. Wholesale and retail dealers in sewing-machines shall be required to pay the tax provided herein for each manufacturer of sewing-machines sold by them, except where the tax required by this Act has been paid by said manufacturer. All unsold sewing-machines belonging to sewing-machine companies, dealers, or their agents, in possession of said companies, dealers, their agents or others, shall be liable to seizure and sale for payment of such fees, license, or tax. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and on conviction shall be punished as prescribed in Section 1065, Volume 2, of the Code of 1910. None of the provisions of this section shall apply to licensed auctioneers selling second-hand sewing-machines, or to officers of the law under legal process, or to merchants buying and selling machines on which a license tax has been paid as herein provided, and who keep the machines and sell and deliver them at their place of business, such sales not being on commission. Provided, that if said merchant shall employ an agent or agents to deliver or sell the machines, the provisions of this Act shall apply to said agent or agents.

§ 993 (284). Taxes, how returned.—The tax provided for in section 993 (291), requires return made to the Comptroller-General in accordance with the law of Georgia. The tax required by §§ 993 (172), 993 (173) shall be returned to the receiver of tax returns in the county of the residence of the person liable to such tax, and shall be entered by the receiver upon the digest of taxable property. In the case of the tax imposed upon foreign corporations by § 993 (212), and the tax imposed by § 993 (241) upon manufacturers of machinery and implements, upon soft-drink syrups by § 993 (270), and upon carbonic acid gas by § 993 (200), the return is required to be made and the tax paid to the Comptroller-General. The tax imposed by § 993 (227) on Insurance Agents

is required to be paid to the Insurance Commissioner. The tax imposed upon legislative agents by § 993 (230) shall be paid to the Secretary of State when each person registers, and he shall not be allowed to register until such tax is paid. All other taxes enumerated and set forth in § 993 (169) to § 993 (281) shall be returned and paid to the tax collector of the county where such vocations are carried on. Provided, however, that nothing in this section shall be construed as changing any other provision in this Act as to whom any tax shall be paid.

Editor's Note.—Note that the Act of 1927 from which this section is taken refers to paragraph 111 of section 2 of the act. But paragraph 110, section 993(281) is the last paragraph of said section.

§ 993 (285). Taxes, how paid.—Be it further enacted by the authority aforesaid, that the taxes provided for in this Act shall be paid in full for the fiscal year for which they are levied; and except where otherwise provided, said taxes shall be paid to the tax-collectors of the counties where such vocations are carried on, at the time of commencing to do business. Before any person shall be authorized to open up or carry on said business, they shall go before the ordinary of the county in which they propose to do business and register their names, the business they propose to engage in, the place where it is to be conducted; and they shall then proceed to pay the tax to the collector, and it shall be the duty of the said ordinary to immediately notify the tax-collector, of such registration, and at the end of each quarter to furnish the Comptroller-General with a report of such special tax registration in his office. Any person failing to register with the ordinary or, having registered, failing to pay the special tax as herein required, shall be guilty of a misdemeanor, and on conviction shall be fined not less than double the tax, or be imprisoned, as prescribed by Section 1065 of Volume 2 of the Code of 1910, or both in the discretion of the court; one-half of said fine shall be applied to the payment of the tax and the other to the fund of fines and forfeitures for the use of the officers of the court. Provided, however, that in all counties of this State where the officers of the Superior Court, or city court, are now or may hereafter be upon the salary basis, the other half of the fine shall be paid into the treasury of such counties and shall become the property of such counties.

§ 993 (286). Insurance companies.—(1) All foreign and domestic insurance companies doing business in this State shall pay one and one-half (1½%) per cent. upon gross premiums received by them in this State for the year, with no deductions for dividends, whether returned in cash or allowed in payment or reduction of premiums, or for additional insurance; nor shall any deduction be allowed for premium abatements of any kind or character, or for reinsurance, except companies doing business in Georgia, or for cash surrender values paid, or for losses or expenses of any kind, said tax being imposed upon gross premiums without any deductions whatever except for premiums returned on change of rate and

cancelled policies and on reinsurance as above provided. Provided, that local organizations known as Farmers' Mutual Insurance Companies, operating in not more than four counties, shall not be subject to this tax. Provided, further, that mutual fire insurance companies chartered by this State, which require their members to make premium deposits to provide for losses and expenses, and which premium deposits are used wholly for the payment of losses and expenses and returned to the policyholders or held to pay losses and expenses and as reinsurance reserves, shall not be subject to this tax.

(2) Every insurance company incorporated under the laws of this State, and doing business on the legal-reserve plan, shall be required to return for taxation all of its real estate as other real estate is returned, and all of the personal property owned by it shall be ascertained in the following manner: From the total value of the assets held by the company, both real and personal, shall be deducted the assessed value of all real estate owned by the company in this State, the non-taxable funds deposited by the company with the State Treasurer, and the amount of the reserve or net value of the policies required by law to be held by the company for its policyholders, and which belong to such policyholders; the remainder shall be the value of the personal property owned by and taxable against such companies.

(3) That whenever any insurance company doing business in this State shall make it appear by proof to the Insurance Commissioner that one-fourth of the total assets are invested in any or all of the following securities or property, to wit: Bonds of this State or of any county or municipality of this State, property situated in this State and taxable therein, loans secured by liens on real estate situated in this State, or policy loans by insurance policies issued by such company on lives of persons resident of this State, then the premium tax levied by the first paragraph of this section shall be abated or reduced to one per centum upon the gross receipts of such company; and if the amounts so invested by any such company shall be as much as three fourths of the total assets of such company, then said premium tax shall be abated or reduced to three fourths of one per centum upon such gross receipts of such company.

§ 993 (287). Manufacturing companies.—Be it further enacted by the authority aforesaid, That the president, superintendent, or agents of all manufacturing and other companies, whether incorporated or not (other than railroad, telegraph, telephone, express, sleeping and palace-car companies, and such other companies as are required to make return of the value of their franchise to the Comptroller-General under the provisions of the Act approved December 17th, 1902, entitled an Act to provide for and require the payment of taxes on franchises, and to provide the method for the return and payment of said taxes), and all persons and companies conducting business enterprises of every nature whatsoever, shall return for taxation at its true market value of all their real estate to the tax-receiver of the county wherein said real estate is located. Provided,

That if the real estate, upon which said manufacturing or other business enterprise of whatsoever nature is carried on, lies on or across the county line, or county lines, and in two or more counties, said real estate shall be returned to the tax-receiver of the county wherein are located the main buildings containing the machinery, or most of the main buildings. Provided further, that all persons, companies, and corporations not excepted above, conducting any business enterprise upon realty not taxable in the county in which such persons reside or the office of the company or corporation is located, shall return for taxation their stock of merchandise, raw materials, machinery, live stock, and all other personalty employed in the operation of such business enterprises, together with the manufactured goods and all other property of such business enterprises and notes and accounts made and the money used in the prosecution of such business enterprises on hand at the time for the estimation of property for taxation, including all personalty of whatsoever kind connected with or used in such enterprises in any manner whatsoever, in the county in which is taxable the realty wherein such business enterprises are located or carried on. Provided further, that the agent in this State of any person, firm, or corporation resident without this State, who shall have on hand and for sale, storage, or otherwise, as such agents, merchandise or other property, including money, notes, accounts, bonds, stocks, etc., shall return the same for taxation to the tax-receiver of the county wherein the same may be taxed for State and county purposes as other property in this State is taxed. The word "merchandise" shall be held to include guano, commercial fertilizer, save and except that all canal and slackwater navigation companies shall make, through their respective executive officers or stockholders in possession of the same, returns to the tax-receiver of each county in which the same is located, or through which the same shall pass in whole or in part, of the right-of-way, locks, and dams, toll-houses, structures, and all other real estate owned by or used by the company or stockholders thereof. Provided, that this Act shall not make subject to taxation any property of canal or navigation companies which is not subject to taxation by the laws of this State now existing. The president of every manufacturing company in this State, and agent, general manager, or person in possession or charge of the business and property in this State of any non-resident persons, firm, or corporation, shall be required to answer under oath, in addition to those provided by law, the following questions:

1. What is the true market value of the real estate of the company you represent, including the buildings thereon?
2. What is the true market value of your machinery of every kind?
3. What is the true market value of real estate not [now?] used in the conduct of the business of your company?
4. What is the true market value of raw materials on hand on the day fixed for return of property for taxation?
5. What is the true market value of manufactured goods or articles on hand on the day for

the return of property for taxation, whether at your principal office or in the hands of agents, commission merchants, or others?

6. How much money did your company have on hand the day fixed for the return of property for taxation, whether within or without the State?

7. State separately the true market value of the notes, bonds, and other obligations for money or property of every kind on hand on the day fixed for the return of property for taxation. And such company shall be taxed upon its entire property so ascertained, and the Comptroller-General is authorized to frame and have propounded any other questions which in his judgment will produce a fuller return.

§ 993 (288). Railroads; return, to whom made.—

(1). All railroad companies, street and suburban railroads, or sleeping-car companies, or persons or companies operating railroads or street-railroads or suburban railroads or sleeping-cars in this State, all express companies, including railroad companies doing express, telephone, or telegraph business, and all telephone and telegraph companies, person or persons doing an express, telephone, or telegraph business; all gas, water, electric light or power, hydro-electric power, steam heat, refrigerated air, dockage or cramage, canal, toll-road, toll-bridges, railroad equipment, and navigation companies, person or persons doing a gas, water, electric light or power, hydro-electric power, steam heat, refrigerated air, dockage or cramage, canal, toll-road, toll-bridge, railroad equipment, or navigation business, through their president, general manager, owner, or agent having control of the company's offices in this State, shall be required to make annual tax returns of all property of said company located in this State, to the Comptroller-General; and the laws now in force providing for the taxation of railroads in this State, shall be applicable to the assessments of taxes from said businesses as above stated. Provided, that small telephone companies, or person or persons doing a telephone business, whose capital stock or property is of less value than (\$5,000.00) five thousand dollars, shall be required to make returns to the tax-receivers of the counties in which such property is located, instead of making returns to the Comptroller-General.

(2). Sleeping car companies. That each non-resident person or company whose sleeping-cars are run in this State shall be taxed as follows: Ascertain the whole number of miles of railroads over which sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax rate imposed upon the property in this State in the same proportion to the entire value of such sleeping-cars that the length of lines in this State over which such cars are run bear to the length of lines of all railroads over which such sleeping-cars are run. The returns shall be made to the Comptroller-General by the president, general agent, agent or person in control of such cars in this State. The Comptroller-General shall frame such questions as will elicit the information sought, and answers thereto shall be made under oath. If the officers above referred to in

control of said sleeping-cars shall fail or refuse to answer, under oath, the questions propounded, the Comptroller-General shall obtain the information from such sources as he may, and he shall assess a double tax on such sleeping-cars. If the taxes herein provided for are not paid, the Comptroller-General shall issue executions against the owners of such cars, which may be levied by the sheriffs of any county in this State upon the sleeping-car or cars of the owners, who have failed to pay the taxes.

(3). Railroad equipment companies. Any person or persons, copartnership, company, or corporations, wherever organized or incorporated, owning or leasing or furnishing or operating any kind of railroad cars except dining, buffet, chair, parlor, palace, or sleeping-cars, which cars are operated, or leased or hired to be operated, on any railroad in this State, shall be deemed an equipment company. Every equipment company, as herein defined, shall be required to make returns to the Comptroller-General, and shall be taxed as follows: Ascertain the total number and the value of all cars of such equipment company, the total car-wheel mileage made by said cars in the United States, and the total car-wheel mileage in Georgia. Then tax such cars at the regular rate imposed upon property of this State in the same proportion to the entire value of such cars that the car-wheel mileage made in Georgia bears to the entire car-wheel mileage of said cars in the United States. The returns shall be made to the Comptroller-General by the president, general manager, agent, or person in control of such cars; and the Comptroller-General shall frame questions as will elicit the information and answers thereto shall be made under oath. If the officers above referred to in control of said cars shall fail or refuse to answer under oath the questions propounded, the Comptroller-General shall obtain the information from such sources as he may, and he shall assess a double tax on such cars. If the taxes herein provided are not paid, the Comptroller-General shall issue executions against said equipment company, which may be levied by the sheriff of any county in this State upon any car or cars owned, leased, or operated by the company failing to pay the tax.

§ 993 (289). Railroad returns and by whom made.

—The presidents of all railroad companies doing business in this State shall make returns to the Comptroller-General in the manner provided by law for the taxation of the property or the gross receipts or net income of such railroads, and shall pay the Comptroller-General the tax to which such property or gross receipts or net income may be subject according to the provisions of this Act and the laws now in force relating to the tax on railroads; and on failure to make returns or refusals to pay tax, said company shall be liable to all the penalties now provided by law, and the Comptroller-General is hereby required, upon failure of such companies to make returns, or if made and not satisfactory to said officer, to proceed against such companies as provided in Section 1050 of the Code of 1910, Volume 2.

§ 993 (290). Banks.—No tax shall be assessed

upon the capital of banks or banking associations organized under the authority of this State, or the United States, located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or non-resident owners, shall be taxed in the county where the bank or banking association are located, and not elsewhere, at their full market value, including surplus and undivided profits, at the same rate provided in this Act for the taxation of other property in the hands of private individuals. Provided, that nothing in this section contained shall be construed to relieve such banks or banking associations from the tax on real estate held or owned by them, but they shall return said real estate at its true market value in the county where located. Provided further, that where real estate is fully paid for, the value at which it is returned for taxation may be deducted from the market value of their shares; and if said real estate is not fully paid for, only the value at which the equity owned by them therein is returned for taxation shall be deducted from the market value of their shares. The bank or banking associations themselves shall make the returns of the property and the shares therein mentioned and pay the taxes herein provided. Branch banks shall be taxed on the value of the capital employed in their operation, in the counties, municipalities, and districts in which they are located, and the parent bank shall be relieved of taxation to the extent of the capital set aside for the exclusive use of such branches. Provided further that banks and trust companies doing a general banking business shall not be required to pay any income tax. Acts 1929, p. 75.

§ 993 (291). Building and loan associations.—Be it further enacted by the authority aforesaid, that mutual building and loan associations operating only in the county of their charter, and limiting their loans to members, shall not be assessed on their capital loaned to stockholders or members thereof. All other building and loan associations or other association of like character shall be required to return, to the tax-receiver of the county where such associations are located, all real and personal property of every kind and character belonging to such associations, except the real property located in another county shall be returned to the tax-receiver of that county.

§ 993 (292). Return by resident agents.—Be it further enacted by the authority aforesaid, that the president and principal agents of all incorporated companies herein mentioned, except such as are required to make returns to tax-receivers of the counties, shall make returns to the Comptroller-General under the rules and regulations provided by law for such returns and subject to the same penalties and modes of procedure for the enforcement of taxes from companies or persons required by law to make returns to the Comptroller-General.

§ 993 (293). Duties of tax-collectors, sheriffs, etc.—It shall be the duty of the sheriffs, their deputies and constables of this State to look carefully after the collection of all taxes that may be

due the State of Georgia under this Act, or any other special taxes due the State of Georgia. It shall be the duty of all tax-collectors and sheriffs and constables of this State to direct and see that all persons, firms, or corporations violating this Act or any of the tax Acts of this State shall be prosecuted for all violations of the tax laws; and every person convicted for a violation of this Act or any of the special tax laws of Georgia, upon the information of any citizen of this State, one fourth of the fine imposed upon any person for violation of the tax laws shall, by order of said court, be paid to such informant or prosecutor.

§ 993 (294). "In towns and cities" defined.—Whenever in any section or paragraph of this Act the words "in towns or cities" occur, the same shall be construed to mean "within one mile of villages, towns, or cities," unless otherwise specified.

§ 993 (295). Fuel distributors; terms defined.—The terms used in §§ 993 (295) to 993 (302) shall be construed as follows: "Fuels" shall include gasoline, benzol, naphtha, and other fuels used in internal combustion engines, but shall not include any such articles which, under a distillation test conducted as prescribed by the bureau of mines of the United States Government for gasoline, will show distillation of the first drop at a temperature of not less than 200 degrees Fahrenheit, and shall not include kerosene oil, or the distillates commonly known as crude fuel oils. "Kerosene" as used in this Act shall include the ordinary household petroleum oil used with wick burners for illuminating, heating, and cooking purposes.

"Distributor" shall include any person, association of persons, firm, corporation, and political subdivision of this State, (a) That imports or causes to be imported, and sells at wholesale or retail or otherwise within this State, any of the fuels or kerosene as specified above; or (b) That imports or causes to be imported, and withdraws for use within this State, by himself or others, any of such fuels or kerosene from the tank-car or other original container or package in which imported into this State; or (c) That manufactures, refines, produces, or compounds any of such fuels or kerosene within this State, and sells the same at wholesale or retail or otherwise within this State for use or consumption within this State.

The term "distributor" shall not include any retail dealer in such fuels or kerosene, or operator or proprietor of a gasoline filling-station or public garage or other place at which such fuels are sold, where such dealer or other person procures his entire supply thereof from a "distributor" as above defined, who has qualified, as such as hereinafter provided. Act 1927, p. 104.

§ 993(296) Fuel distributors amount of tax.—Each distributor of fuels who engages in such business in this State shall pay an occupation tax of six cents per gallon for each and every gallon of such fuels (1) imported and sold within this State, or (2) imported and withdrawn for use within this State, or (3) manufactured, refined, produced, or compounded within this

State and sold for use and consumption within this State, or used and consumed within this State by the manufacturer, refiner, producer, or compounder. Nothing in this Act contained shall be so construed as to cause double taxation on any of the products specified herein. Where kerosene or fuels are manufactured or refined in this State are shipped out of this State and are brought back into this State and used or consumed, the respective taxes herein fixed shall be paid on such kerosene and fuels. Any manufacturer or refiner in this State may sell to any duly licensed distributor under the terms of this act, and require the purchasing distributor to pay the tax herein imposed; provided such manufacturer or refiner shall report all such sales to the Comptroller-General not later than the next business day after the shipment was made, giving full details of the sale, including quantity, the car initials, and number, if a car-load shipment, date of shipment, and name and address of consignee. That the proceeds of said tax shall be distributed as follows: four cents per gallon shall be set aside to the State-highway fund, for use in construction on the State-highway system of roads, or State-aid System of roads; and one cent per gallon to the several counties of this State as now provided by law. The one cent of gas tax not allocated under the terms of this bill is hereby set aside to the public schools of said State for an equalization school fund. That said six cents tax shall become operative and in effect on the first day of September, 1929. Provided, however, that should that portion of said gas tax bill allocated or set apart to the counties of this State not be available for any reason for such allocation to the said counties, then and in such event such portion of said tax be and is hereby allocated and set apart to the State-highway fund to be expended on the State-highway System by the State Highway Board in addition to the said four cents tax already allocated to said State-highway system; and provided further that should that portion of said gas tax allocated or set apart to the equalization fund for the common-school system not be available for any reason for such allocation to the said equalization fund, then and in such event such portion of said tax be and is hereby allocated and set apart for educational purposes in instructing children in the common schools of this State, in addition to any other appropriation and allocations to the support of the common schools of this State, and shall be paid into the treasury of said State and there remain covered for such purposes. Acts 1929, p. 101, § 2.

§ 993(296a). Further definition of "distributor."—"Distributor" as used in the 1929 amendment shall also include any person, firm, corporation, association of persons, municipalities, counties, or any subdivision thereof in the State of Georgia, which shall import into this State from any other State or foreign country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more after the same shall lose the interstate character as a shipment in interstate commerce, any of the fuels or kerosene as specified above. Acts 1929, p. 103, § 4.

§ 993(297). Fuel distributors; tax on kerosene distributors.—Each distributor of kerosene who engages in such business in this State shall pay an occupation tax of one (1) cent per gallon; the proceeds of such tax to be covered into the general treasury. All of the subsequent regulatory provisions of this Act, except the rate of tax, shall apply to distributors of kerosene. The (1) cent of kerosene oil tax levied under this section is hereby set aside to the public schools of said State for an equalization school fund.

§ 993 (298). Fuel distributors; registration. — Every such distributor shall register with the Comptroller-General of this State on or before September 1st, 1927, and on or before the same day of the same month of each succeeding year, giving his or its name, place of business, and post-office address; and shall obtain from said Comptroller-General a license to do business as a distributor of motor-fuels and kerosene in this State. The Comptroller-General shall keep a well-bound book to be used for the purpose of registration as herein described.

§ 993 (299). Fuel distributor; invoices and bills.—Be it further enacted by the authority aforesaid, that such distributor shall keep and preserve all invoices of bills of fuels and kerosene sold for the period of one year, and submit the same to the Comptroller-General of this State, whenever required by him.

§ 993 (300). Fuel distributors; monthly reports.—All distributors of fuels and kerosene in this State shall make a monthly report, to the Comptroller-General of this State, of all fuels and kerosene sold or used by them. The first such return or report shall be made on or before October 20, 1927, and shall embrace and include all fuels and kerosene sold or used during the month of September, 1927, and a similar return or report shall be made on or before the 20th of each month thereafter, and shall embrace and include all fuels and kerosene sold or used during the immediately preceding calendar month. Said report or return shall show the number of gallons sold or used, and shall be sworn to before an officer of this State duly authorized to administer oaths.

§ 993(301). Payment to Comptroller-General.—Each distributor of fuels and kerosene engaged in such business in this State shall pay the occupation tax of six cents per gallon on fuels and one cent per gallon on kerosene, as herein provided, to the Comptroller-General of this State. The first such payment shall be made on or before October 20, 1927, and shall embrace and include the tax for all fuels and kerosene sold or used during the month of September, 1927; and on or before the 20th of each month thereafter he shall pay to the Comptroller-General said occupation tax on all fuels and kerosene sold or used during the immediately preceding calendar month. Acts 1929, § 3.

§ 993 (302). Fuel distributors; bond by distributor.—From and after the passage of this Act each

distributor of motor fuels and kerosene engaged in such business in this State shall give a good and sufficient indemnifying bond, payable to the State of Georgia, in a sum not less than \$25,000.00. Said bond shall be for the payment of the occupation tax, the making of the monthly report and the annual registration as hereinbefore set forth, and for the full, complete and faithful performance of all the requirements of this Act. Said bond shall be made by a surety company authorized to do business in this State, and the cost of same shall be paid by the distributor. Provided further, that when a distributor collects less than \$25,000.00 per month in taxes due the State, his bond shall be fixed in the discretion of the Comptroller-General of the State.

§ 993(303). Filling stations.—That each and every person, firm, association or corporation within the State retailing or wholesaling gasoline must pay a tax of \$5.00 on each and every pump or filler used or in connection with the sale of gasoline. Each and every person, firm, association, or corporation liable for the tax herein imposed shall pay the same to the Comptroller-General of this State at the beginning of each fiscal year, and upon said payment so made the Comptroller-General of this State shall issue or cause to be issued to the said person, firm, association, or corporation paying said tax a receipt for each pump or filler so taxed, which said receipt shall be at all times displayed in the filling-station or place of business of the person or corporation paying said tax, showing the exact numbers of pumps or fillers the said person, firm, association, or corporation is entitled to operate. Acts 1929, p. 73, § 30.

§ 993(304). Auto transportation companies. — There shall be collected by the Comptroller-General from every auto transportation company, association, or individual, as defined hereinafter, to which has been granted a certificate of public convenience and necessity, which it or they are hereby required to obtain from the Public Service Commission of this State, permitting him, it, or them to engage in the transportation of passengers or freight, or both, between fixed termini, an occupation tax on a mileage basis of one quarter ($\frac{1}{4}$) cent per mile on all busses with a capacity of 10 passengers or less, and a mileage tax of one-half ($\frac{1}{2}$) cent per mile on all busses with a capacity of not more than 20 passengers nor less than 10 passengers, and a mileage tax of three quarters ($\frac{3}{4}$) cent per mile on all busses with a capacity of more than 20 passengers; and a mileage tax of three quarters ($\frac{3}{4}$) cent per mile on all trucks with a loaded capacity of less than 5,500 pounds, and a tax of two (2) cents per mile on all trucks with a loaded capacity of 5,000 pounds or more, coming within the terms of this Act, for every mile traveled by the motor vehicles of such auto transportation company, association, or individual, over the public highways of this state. This tax shall be paid quarterly, beginning December 31, 1929. Provided that at the time of issuing of said certificate of public convenience and necessity, and at the beginning of each calendar quarter thereafter, the Comptroller-General shall collect from

each holder of such certificate the sum of seventy-five (\$75.00) dollars as an advance payment upon the mileage tax herein levied for the ensuing quarter, which said amount shall at the end of the quarter be credited to said holder of such certificate, and the difference between the said amount and the correct amount of said tax shall be adjusted by the Comptroller-General with the said holder of such certificate. No occupation tax or business license may be laid by any municipality upon any firm, person, or corporation coming under the provisions of this section. The provisions of this section shall not apply to bus lines operating under franchise of the United States Government and under the regulation and supervision of said United States Government and solely between any point or points in this State and a military reservation of said Government. Acts 1929, p. 74, § 31.

§ 993(305). Automobile financing.—Upon every firm, person, or corporation engaged in the business of automobile financing, handling notes or any evidence of debt pertaining to the purchase of automobiles, and the discounts of the purchase-money notes thereof, a tax of one hundred dollars (\$100.00) for each place of business. Acts 1929, p. 51, § 32.

§ 993(306). Collection of taxes.—Whenever the State Tax Commissioner shall have reason to believe that the taxpayers in any county are not registering their businesses with the ordinary as required by law and are failing to pay their special taxes, he shall have authority, upon recommendation of the Governor, to employ a competent person or persons to go in said county, ascertain the facts, collect said tax, and report his finding together with the amount of money collected to the State Tax Commissioner. The compensation for his services shall be a percentum of the taxes collected by his efforts; said commission to be fixed by the State Tax Commissioner upon approval of the Governor. Acts 1929, p. 76, § 34.

§ 993(307). Penalty for default.—Be it further enacted by the authority aforesaid, that should any of taxes herein imposed remain due and unpaid for 30 days from due date thereof, then such person, firm, or corporation shall be subject to and shall pay a penalty of (50%) fifty per cent of the tax imposed. Acts 1929, p. 76, § 35.

ARTICLE 1A

Cigar and Cigarette Tax

§ 993(308). License, application, for each place of business; leaf tobacco not included. — Every person, firm, or corporation engaged in the business of purchasing, selling, or distributing within this State cigars or cigarettes shall, within thirty (30) days after the approval of this Act, file with the Commissioner of Revenue an application for a license permitting them to en-

gage in such business. The application for license shall be filed on blanks to be furnished by the Department of Revenue of said State for that purpose, and shall contain a statement including the name of the individual, the name of the partnership and of each individual partner, or corporation, the postoffice address, and the nature of the business, whether wholesale or retail, in which engaged. In case any business is conducted at two or more separate places, license for each place of business shall be required; provided, that any person, firm, or corporation hereafter intending to engage in the business of buying, selling, or distributing cigars or cigarettes shall precedent to engaging in such business, file an application for a license in the manner and form hereinabove set forth required. Upon receipt of an application for a license to engage in the business above set forth, the Commissioner of Revenue shall issue to such applicant a license permitting the purchase, sale, and distribution of the articles referred to in this section. Such license shall be displayed at all times in some conspicuous place at or in his or its place of business easily seen by the public. Nothing herein shall be construed as requiring a license for the privilege of buying, selling, or distributing leaf tobacco; Provided further that every retail dealer, when filing application for license, shall state the kind and nature of business engaged in, whether drugs, grocery, hardware, general merchandise, or other business. No license provided by this Act shall be required prior to October 1, 1929, and said licenses shall then terminate on December 31, 1930, after which date annual licenses shall be required for each calendar year commencing with January 1, 1931. Acts 1929, p. 78, § 4.

Editor's Note.—This act, codified as §§ 993(308)-993(315), amended the act of 1923, codified as §§ 993(149) et seq. of the Code of 1926. For penal provisions, see P. C. §§ 464(4) et seq.

§ 993(309). Revocation of license. — In addition to the penalties imposed in this Act, and after conviction by a court of competent jurisdiction for any violation of the provision of this Act, [See P. C. §§ 464(4) et seq.] the Commissioner of Revenue may revoke any license which may have been issued to the party or parties adjudged guilty by the court, and, upon good cause shown by the party whose license has been revoked, may issue a new license when, in his discretion such applicant conforms to the provisions of this Article. No license issued permitting the sale and distribution of tobacco products shall be transferable, and any license issued to any individual, firm, or corporation who shall afterwards retire from business, except as hereinafter stated, shall be null and void: Provided that any one may be allowed to operate for ten (10) days after purchase of stocks in bulk, pending granting of license, upon application made upon such purchase; and provided further that heirs or legal representatives or surviving partners of deceased persons, and receivers or trustees of insolvent corporations, may conduct said business for the period of said license without taking out new license. Acts 1929, p. 79, § 5.

§ 993(310) Stamps, time of affixing.—The li-

cense taxes imposed by this section shall be paid by retail dealers by affixing stamps in the manner and at the time herein set forth. In the case of cigars, the stamps shall be affixed to the box or container in which or from which they are normally sold at retail; and in the case of cigarettes, the stamps shall be affixed to each individual package: Provided that any retailer shall have forty-eight (48) hours within which to affix the stamps after such tobacco products are received by him or them. Acts 1929, p. 79, § 7.

§ 993(311). Sellers of stamps, commission of.—The Commissioner of Revenue is hereby authorized to engage any person, firm, or corporation to sell tax stamps, and shall allow as compensation, for receiving, selling, and accounting for such stamps, not exceeding one (1%) per cent, of the amount sold, which said commission for the sale of said stamps shall be paid from the proceeds of the sale of said stamps. That the Commissioner of Revenue may promulgate rules and regulations providing for the refund to dealer of the cost of stamps affixed to goods which by reason of damage become unfit for sale and are destroyed by the dealer or returned to the manufacturers. Acts 1929, p. 80, § 8.

§ 993(312). Condemnation, and sale of unstamped goods.—Whenever any cigarettes, cigars, stogies, or cheroots shall be found in the establishment or establishments of any retailer, if such goods shall have remained therein for a greater length of time than forty eight (48) hours after their receipt at or in the place of business of such dealer, without bearing the stamps required by the terms of this Article to be affixed thereto, as herein prescribed, the Revenue Commissioner of the State of Georgia, or his agents or deputies, is hereby authorized, and it shall be his duty, to seize such goods and immediately institute condemnation proceedings under the provisions of the law prescribed for condemnation in the premises; and if upon the hearing of such condemnation proceeding it shall appear that said goods were not stamped in accordance with the provisions of this article, the Revenue Commissioner, or his agents or deputies, shall take possession of such goods, and advertise the same in the county where seized for thirty days next preceding the day of sale, and shall sell said goods at and before the courthouse door of the county where said goods were seized, to the highest bidder for cash at such sale. In addition to the purchase-price of said goods, the successful bidder shall be required to purchase revenue stamps and affix same to the goods so purchased; and it shall be the duty of the said Commissioner of Revenue to cover into the Treasury of the State of Georgia any and all sums of money obtained by such sales, after deducting therefrom all expenses incident to the condemnation and advertising and sale of such goods. Acts 1929, p. 81, § 10-A.

§ 993(313). Procedure in case of seizure.—In all cases of seizure of any cigarettes, cigars, stogies, or cheroots as being subject to forfeiture

under the provisions of this article, which, in the opinion of the officer or person making the seizure, are of the appraised value of \$25.00 or more, the said officer or person shall proceed as follows:

First: He shall cause a list containing a particular description of the tobacco products hereinbefore described and so seized to be prepared in duplicate, and the appraisalment thereof to be made by three sworn appraisers to be selected by said Commissioner of Revenue, or his agent, who shall be respectable and disinterested citizens of the State of Georgia, residing within the county where the seizure was made. Said list and appraisalment shall be properly certified and attested by said Commissioner of Revenue, or his agent, and by said appraisers. For the services of each of said appraisers there shall be allowed the sum of \$1.00 per day, not exceeding two (2) days, to be paid by the commissioner of Revenue out of any revenue received by him from the sale, or the proceeds of the sale of the confiscated goods of the individuals, companies, or corporations which may be affected by said seizure.

Second: If the said goods are believed by the officer making the seizure to be of less value than \$25.00, no appraisalment shall be made.

Third: Said officer or person making the seizure or agent of the Commissioner of Revenue aforesaid, shall proceed to publish a notice, for fifteen days, in writing at the court-house door in the county where the seizure was made, describing the articles and stating the time and place and cause of their seizure, and requiring any person claiming them to appear and make such claim in writing within thirty days from the date of the seizure. A copy of said notice shall be served upon the owner, or person in charge of such articles when seized, if the owner be known, within five days of the date of said seizure; the notice herein provided for shall be in the name of the Commissioner of Revenue, and may be served by any officer now authorized by law to serve civil process, or any duly authorized employee of the department of Revenue.

Fourth: Any person claiming the said goods so seized as contraband, within the time specified by the notice, may file with the clerk of the superior court of the county where the seizure is made, a claim in writing, stating his interest in the articles seized, under which said claim any lawful defense may be asserted, may execute a bond to the Commissioner of Revenue in the penal sum equal to double the value of said goods so seized, but in no case shall said bond be less than the sum of \$50.00, with surety to be approved by the clerk of the superior court in the county in which the goods are seized, conditioned that in the case of condemnation of the articles so seized the obligors shall pay to the Commissioner of Revenue the full value of the goods so seized, and all costs and expenses of the proceeding or proceedings to obtain said condemnation. And upon the delivery of said bond and a copy of the list of the articles so seized as aforesaid, the Commissioner of Revenue shall transmit the same, with the duplicate list or description of the goods seized, to the

solicitor-general of the circuit in which said seizure was made, or, in his discretion, to the solicitor of the city court of the county in which said seizure was made, if there is a city court in such county, and the solicitor-general aforesaid, or solicitor of the City Court aforesaid, shall prosecute the case to secure the forfeiture of said goods in the court having jurisdiction. Upon the filing of the bond aforesaid, the said property seized shall be delivered to the claimant pending the outcome of said case, which said claim shall be filed and disposed of as other claim cases under the laws of this State. For the services in such cases of forfeiture as herein provided the solicitor-general or solicitor of the city court, as the case may be, shall receive \$10.00 in each case; provided said sum does not exceed one half of the amount involved, and when the amount involved does not exceed \$20.00 he shall receive one-half of the amount recovered.

Fifth: If no claim is interposed, and no bond given within the time specified, or if claim is made and not sustained, the said solicitor-general or solicitor of the city court, as the case may be, may apply to the judge of the superior court, or judge of the city court, of the county where said property has been seized, for an order or a judgment, and for sale of said property at public outcry at the court-house door of said county after three-days' advertisement by posting notice of said sale at the court-house door of said county. The proceeds of said sale when received by the Commissioner of Revenue shall be turned into the State Treasury as other revenues are required by law to be turned in. Acts 1929, p. 81, § 10-B.

§ 993(314). Return of seized goods. — The Commissioner of Revenue may, in his discretion, return any goods seized under this Act, or any part thereof, when it is shown that there was no intention to violate the provisions of this Act, upon payment to the Commissioner of Revenue, or his deputy or agent, of the amount due and required by law for revenue stamps required under this Act to be placed on and upon any such property so returned. Acts 1929, p. 84, § 10-C.

§ 993(315). Constitutionality. — In the event any section of this article shall be declared unconstitutional by the courts, the remaining sections of this article shall not be affected thereby. Acts 1929, § 84, § 11.

ARTICLE 1B

Occupation Privilege—Sales Tax Act of 1929

§ 993(316). Definitions. — When used in this Article, the term "person" or the term "company," herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is dis-

closed by the context. The term "tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commission to use the same as the tax period in lieu of the calendar year. The term "sale" or "sales" includes the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. The word "taxpayer" means any person liable for any tax hereunder. The term "gross receipts" means the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees, or other emoluments, however designated, and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid, or any other expenses whatsoever, and without any deductions on account of losses. The term "business" as used in this Act shall include all activities engaged in or caused to be engaged in with the object of gain, benefit, or advantage, either direct or indirect, and not excepting sub-activities, producing marketable commodities used or consumed in the main business activities, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls. The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible property, without any deduction on account of the cost of property sold, expense of any kind, or losses. Act 1929, p. 103, § 1.

§ 993(317). Tax levy from October 1, 1929.—From and after the first day of October, one thousand nine hundred twenty-nine, there is hereby levied and shall be collected annual privileges taxes against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values and/or gross receipts, as the case may be, as follows: Acts 1929, p. 104, § 2.

§ 993(318). Manufacturers taxed on value of products as shown by gross proceeds of sales, half mill on dollar.—Upon every person engaging or continuing within this State in the business of manufacturing, compounding, or preparing for sale, profit, or use any article, substance, or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles manufactured, compounded, or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), a tax of one half of one mill on the dollar thereof. The measure of this tax is the value of the entire products manufactured, compounded, or prepared for sale, profit, or use in this State, regardless of the place of sale or the fact that deliveries may be made to points outside the State. Provided that for the purposes of this Act persons, firms, or corporations engaged in the business of packing, canning, and preserving sea foods shall be deemed manufacturers with respect to said sea food so canned or preserved.

Provided that all persons, firms and corporations engaged in the business of canning and preserving peaches or other fruits or vegetables shall be deemed manufacturers under this Act. If any person liable for any tax under section 3 shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products or articles in the condition or form in which they existed when transported out of the State shall be the basis for the assessment of the tax imposed in said paragraph; and the tax-commissioner shall prescribe equitable and uniform rules for ascertaining such values. In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between buyer and seller is such that the gross receipts from the sale are not indicative of the true value of the subject-matter of the sale, the tax-commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as near as possible to the gross proceeds from the sale of similar products of like quality or character by the other taxpayers where no common interest exists between the buyer and the seller, but otherwise under similar circumstances and conditions. Acts 199, p. 105, § 3.

§ 993(319). Tax on business of selling.—Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, there is likewise hereby levied, and shall be collected, a tax equivalent to two mills on the dollar of the gross receipts of the business; provided, however, that in the case of a wholesaler, jobber, or broker, the tax shall be equivalent to one mill on the dollar of the gross receipts of the business. The classification of wholesaler or jobber shall be used by any person doing a regularly organized jobbing business, known to the trade as such, and having regularly in his exclusive employment one or more traveling salesmen, and who does not sell direct to the consumer or final user.

There shall be excepted from such gross receipts of any such persons or companies all gross receipts derived from the sale of fertilizers, fertilizer materials, or calcium arsenate. Acts 1929 p. 106, § 4.

§ 993(320). On gross receipts of railroads, light, power, telegraph, telephone companies, etc.—Upon every person engaging or continuing within this State in the following business there shall be levied and collected on account of each of the business engaged in, taxes at the rate of three mills on the dollar upon the gross receipts of said business, to wit: steam railroads, street railroads, electric-light and power companies, telephone companies, telegraph companies, express companies, natural and artificial gas companies. Acts 1929, p. 106, § 5.

§ 993(321). Gross receipts of shows. —Upon every person engaging or continuing within this State in the business of operating a theatre, opera house, moving-picture show, vaudeville show,

race-track, or baseball park, the tax shall be three mills on the dollar upon the gross receipts of any such business. Acts 1929, p. 106, § 6.

§ 993(322). On other business—exception in case of tax prohibited by U. S. Constitution. — Upon every person engaged or continuing within this State in any and every business not included in the preceding sections there is levied and shall be collected a tax equal to two mills on the dollar of the gross receipts of any such business. There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such persons or companies as the State of Georgia is prohibited from taxing under the constitution of the United States of America. Acts 1929, p. 107, § 7.

§ 993(323). Exemption of \$30,000 a year in value prorated. — In computing the amount of tax levied under the provisions of this Act for any year there shall be deducted from the values or from the gross receipts of the business, as the case may be, an exemption of thirty thousand (\$30,000.00) dollars of the amount of such value or gross receipts. Every person exercising any privilege taxable hereunder for any fractional part of a tax year shall be entitled to an exemption of that part of the sum of thirty thousand (\$30,000.00) dollars which bears the same proportion of the total sum that the period of time during which such person is engaged in such business bears to a whole year. Acts 1929, p. 107, § 8.

§ 993(324). License.—If any person after the first day of October, one thousand nine hundred and twenty-nine, shall engage or continue in any business for which a privilege tax is imposed by this Act, he shall be deemed to have applied for and to have duly obtained from the State of Georgia a license to engage in and to conduct such business for the current tax year, upon the condition that he shall pay the tax accruing to the State of Georgia under the provisions of this Act; and he shall hereby be duly licensed to do such business. Acts 1929, p. 107, § 9.

§ 993(325). Exemption as to insurance companies, banks, trust companies, mutual benefit association, etc.—There are, however, exempted from this Act: (a) insurance companies which pay to the State of Georgia a tax upon premises, banks and trust companies doing a banking business, organized under the laws of this or any other State or of the United States, dealers in stocks and bonds or the discounting, buying and selling of notes or other evidences of indebtedness; (b) mutual savings banks not having a capital stock represented by shares and which are operated exclusively for the benefit of depositors; and mutual fire-insurance companies not having a capital stock represented by shares, which are operated exclusively for the benefit of their policy-holders; (c) labor, agricultural and horticultural societies, and products of farm, including live stock, grove or garden, when sold directly by the producer or his authorized agent

and so long as said farm products are handled and/or sold in their original packages, and/or in general state or condition of or preparation for sale; cemetery companies which are organized and operated exclusively for the benefit of their members; fraternal benefit societies, orders or associations operating under the lodge system and providing for the payment of death, sick, accident or other benefits to members of such societies, orders or associations, and to their dependents; mutual building and loan associations operated exclusively for the benefit of their members; corporations, associations or societies organized and operated exclusively for religious, charitable, scientific or educational purposes; business leagues, and organizations operated exclusively for the benefit of the community and for the promotion of social welfare, none of which companies, organizations, corporations or societies are organized for profit and no part of the income of which inures to the benefit of any private stockholder or individual. Acts 1929, p. 108, § 10.

§ 993(326). Exceptions as to sales of gasoline.—The tax on retail sales of gasoline shall not be included in nor affected by his Act, but the same shall remain under and be controlled by the Act of the General Assembly approved August 24th, 1927, and amendatory Acts thereto. Acts 1929, p. 108, § 11.

§ 993(327). Payment in quarterly installments; time of tax-returns; form of return; re-examination; extension of time for return or payment.

—The taxes hereby levied shall be payable in quarterly installments, that is to say, all taxes accruing in any quarter shall be payable within thirty (30) days after the expiration of such quarters. The taxpayer shall, within said period of thirty (30) days, prepare and mail or otherwise deliver to the State Tax Commissioner a tax-return under oath, together with a remittance for the amount of the taxes due as shown by said return. Said return shall be made upon a form to be prescribed by the State tax Commissioner and furnished on application to the taxpayer. All remittances in payment of taxes hereby levied shall be made in cash, or by certified or cashier's check, postal money-order, or certificates of deposit. Upon receipt of such return and remittance the State Tax Commissioner shall issue to the taxpayer a receipt for such payment; but the acceptance of such return or remittance, or the issuance of such receipt by the State Tax Commissioner, shall not prevent a re-examination of such return or remittance or a reassessment of the tax as herein provided. All monies received by the State Tax Commissioner hereunder shall be paid into the State Treasury, and shall be kept, accounted for, and disposed of as provided by law. Said tax-return, if made by an individual, shall be verified by the oath of the taxpayer; or, if this be for any reason impracticable, then by the oath of a duly authorized agent having knowledge of the facts; if said return be made by a corporation or other association, it shall be verified by the oath of any authorized agent having knowledge of the facts. The State Tax Commissioner may, for good

cause shown, extend the time for the making of any such return or remittance; but in no case shall such extension be for a period exceeding ninety (90) days; and in every case where such an extension is granted, six percentum (6%) per annum interest shall be collected upon the amount of such tax. Provided that when the total annual gross receipts of any person liable under this Act do not exceed twenty-five thousand (\$25,000.00) dollars, returns may be payable at the end of the month next following the close of the year, and annual returns and payments made monthly instead of quarterly. Acts 1929, p. 109, § 12.

§ 993(328). Correction of error in computing tax.—If the taxpayer shall make any error in computing the tax assessable against him, the State Tax Commissioner shall correct such error or reassess the proper amount of taxes, and notify the taxpayer of his action by mailing to him promptly a copy of the corrected assessment, and any additional tax for which such taxpayer may be liable shall be paid within ten days after the receipt of such statement. Acts 1929, p. 110, § 13.

§ 993(329). Authority to examine records, etc.—When the State Tax Commissioner shall have any reason to believe that any return or report made under this Act is untrue or inaccurate, it shall have the authority personally or through designated agents to examine the records of any person and to require, of such person, his officers, agents, or employees answers under oath, at an examination conducted by any member of the State Tax Commissioner or its designated agents. Acts 1929, p. 110, § 14.

§ 993(330). Failure to make return.—If any person fail or refuse to make a return, the State Tax Commissioner shall proceed, in such manner as may seem best, to obtain facts and information on which to base the assessment of the tax herein prescribed; and to this end he may by himself or his duly appointed agent, make examination of the books, records, and papers of any such person, and may take evidence, on oath, of any person who he may believe shall be in possession of facts or information pertinent to the subject of inquiry, which oath he or his agent as appointed by him may administer. As soon as possible after procuring such information as he may be able to obtain with respect to any person failing or refusing to make a return, the State Tax Commissioner shall proceed to assess the tax against such person, and shall notify him of the amount thereof, and his act shall be final as to any person who refused to make a return. Acts 1929, p. 110, § 15.

§ 993(331). Lien of tax as affecting purchaser of business.—The tax imposed by this Act shall be a lien upon the property of any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, and such person shall be required to make the return provided for under this Act within thirty days after the date he sold out his

business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase-money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Tax Commissioner showing that the taxes have been paid. If the purchaser of the business or stock of goods shall fail to withhold purchase-money as above provided, and the taxes shall be due and unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. Acts 1929, p. 111, § 16.

§ 993(332). State tax board; petition for correction of assessment; appeal injunctions.—There shall be, and there is hereby created a State Tax Board, which shall be composed of the Secretary of State, the Attorney-General, and the State Auditor of the State of Georgia. Such board shall have powers and duties prescribed by this Act. If any person having made the return and paid the tax as provided by this Act shall feel aggrieved by any assessment or reassessment made against him by the State Tax Commissioner, he may apply by petition to the State Tax Board, at any time within thirty (30) days after the notice is mailed to him by the State Tax Commissioner as aforesaid, for a hearing upon and a correction of the amount of said tax so assessed or reassessed against him by the State Tax Commissioner. Said petition shall be in writing, and the same shall be filed in triplicate, and the same shall set forth and show in short and simple form the facts upon the basis of which it is claimed the hearing and reduction should be granted. The State Tax Board shall promptly consider said petition and grant or deny such hearing. If the petition be denied, the petitioner shall be forthwith notified of the fact. If the petition shall be granted, the petitioner shall be notified of the time and place of such hearing. After such hearing the State Tax Board shall make such order in the premises as may appear to it to be just and lawful, and shall furnish a copy of such order to the petitioner. In the event of a reduction of the tax, the excess paid shall be refunded to the petitioner by the State Tax Commission.

Any taxpayer who shall be dissatisfied with any order of the State Tax Board may, within thirty (30) days after the rendition of such order, file his bill of complainant in the Superior Court of the county in which the tax accrued, setting forth his grounds of complaint, and such Superior Court shall hear and determine such matter as causes in chancery are heard and determined. Appeal shall lie to the Supreme Court, as in other causes. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest at the rate of 6% per annum, in any proper action or suit against the State Tax Commissioner, and the Superior Court of the county in which the tax accrued shall have original jurisdiction of any action to recover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of

the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

No injunction shall be awarded by any court or judge to restrain the collection of any tax imposed by this Act, or any part thereof due from any person, except upon the ground that the assessment thereof was in violation of the constitution of the United States or of this State or that the same was fraudulently assessed or that there was an error made in the amount of the tax assessed against such person. In the latter case no injunction shall be granted unless application shall have been first made to the State Tax Board as herein provided for a correction of the alleged error, and unless said State Tax Board shall have refused to correct the same, which facts shall appear from the allegation of the bill of complaint; and no injunction shall be granted to restrain the collection of any tax levied hereunder unless and until the complainant shall give bond as required by law in other suits for injunction on which a bond is required, which bond shall be conditioned for the prompt and full payment of all taxes that may be determined to be due from the complainant by the decree which shall be entered in said cause, and in the event the amount of said assessment as fixed by said decree shall be in excess of the true amount as claimed by the complainant, then also for the prompt and full payment of all penalties that may have accrued and the cost of said suit. Acts 1929 p. 111, § 17.

§ 993(333). Suit to collect tax; penalty. — A tax due and unpaid under this Act shall constitute a debt due the State, and may be collected by action in debt or assumpsit or other appropriate judicial proceeding, which remedy shall be in addition to all other existing remedies; and it shall constitute a lien upon all the property of the taxpayer, and the same shall be collected together with an additional five per cent. of the amount of the tax and the costs of collection, if paid within thirty days after the date it was due, and an additional two per cent. of the amount of the tax for each succeeding thirty days elapsing before the tax shall have been paid; provided, however, that the additional two per cent. penalty shall not be applied until a ten-day notice of delinquency shall have been sent to the taxpayer. Acts 1929, p. 113, § 18.

§ 993(334). Tax year. — The assessments of taxes herein made and the returns required therefor shall be for the year ending on the thirty-first day of December; provided, however, that if the taxpayer, in transacting his business, keeps the books reflecting the same on a basis other than the calendar year, he may, with the assent of the tax commission, make his annual returns and pay taxes for the year covering his accounting period, as shown by the method of keeping the books of his business. Acts 1929, p. 113, § 19.

§ 993(335). Tax imposed in addition to other

taxes; remittances, how made. — The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder except as in this Act otherwise specifically provided.

All remittances of taxes imposed by this Act shall be made to the State Tax Commissioner by bankdraft, certified check, cashier's check, or certificate of deposit, who shall issue receipts therefor to the taxpayer and shall pay the money into the State Treasury, to be kept and accounted for as provided by law. Acts 1929, p. 114, § 20.

§ 993(336). Corporation not to receive certificate of dissolution or withdrawal, until tax paid. — The Secretary of State shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this State or organized under the laws of another State and admitted to do business in this State until the receipt of a notice from the State Tax Commissioner to the effect that the tax levied under this Act against any such corporation has been paid or provided for, if any such corporation is a taxpayer under the law, or until he shall be notified by the tax commission that the applicant is not subject to pay a tax hereunder. Acts 1929, p. 114, § 21.

§ 993(337). Penalties for violation of Act. — It shall be unlawful for any person to refuse to make this return provided to be made in this Act, or to make any false or fraudulent return or false statement in any return, with intent to defraud the State or to evade the payment of the tax, or any part thereof, imposed by this Act, or for any person to aid or abet another in any attempt to evade the payment of the tax or any part thereof, imposed by this Act; or for the president, vice-president, secretary, or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required in this Act, with the intent to evade the payment of any tax hereunder. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than one thousand dollars or imprisonment not exceeding one year in the county jail, or punished by both fine and imprisonment, at the discretion of the court, within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear or verify any false or fraudulent return, or any return containing any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of false swearing, and on conviction thereof, shall be punished in the manner provided by law. Any company for which a false return, or a return containing a false statement as aforesaid, shall be made, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars. The criminal courts of the county in which the offender resides, or, if a company, in which it carries on business, shall have concurrent jurisdiction to enforce this section. Acts 1929, p. 114, § 22.

§ 993(338). State Tax Commissioner's powers

and duties; prosecuting attorney.—The administration of this Act is vested in and shall be exercised by the State Tax Commissioner, who shall prescribe the forms and reasonable rules of procedure in conformity with this Act for making of returns and for the ascertainment, assessment, and collection of the taxes imposed hereunder; and the enforcement of any of the provisions of this Act in any of the courts of the State shall be under the exclusive jurisdiction of the Tax Commissioner, who may require the assistance of and act through the prosecuting attorney of any county, and may employ special counsel in any county to aid the prosecuting attorney, but the prosecuting attorney, of any county shall receive no fees or compensation for services rendered in enforcing this Act in addition to the salary paid by the county to such officer. Acts 1929, p. 115, § 23.

§ 993(339). **Expense of enforcing Act.**—The State Tax Commissioner is authorized to expend from the funds collected hereunder such sums as may be necessary in its judgment to effectively carry out the provisions of this Act. Acts 1929, p. 115, § 24.

§ 993(340). **Act to expire Dec. 31, 1931.**—This Act shall continue in force until the 31st day of December, one thousand nine hundred and thirty-one, and shall expire upon said date; provided that no person or company shall be relieved from the taxes accruing under this Act for the tax year or the taxable year one thousand nine hundred and thirty-one, or any part thereof. Acts 1929, p. 116, § 26.

§ 993(341). **Reduction of tax hereunder in amount paid as net income tax.**—The aggregate of the tax payable hereunder by any taxpayer during any tax year or fractional part thereof shall be reduced in the amount of any tax imposed on the net income of such taxpayer and paid by him to the State during the same period; and if the amount of such tax on his net income exceeds the tax payable hereunder, no tax shall be collected under this Act. At the time of making any quarterly payment of the tax imposed hereby the taxpayer may take credit for the amount of any such tax on his net income paid by him during the three months immediately preceding such payment, but subsequent adjustments may be made so as to effect the reduction of the aggregate tax payable hereunder for any tax year, or fractional part thereof, to the full extent of any tax on his net income paid by such taxpayer during such period. Provided, however, that should it be held in any judicial proceeding that the enforcement of this provision would render invalid, in whole or in part, this law or the law providing for said income tax, then this provision shall itself become null and void, be ineffective and unenforceable, and this law and said income-tax law shall stand as though this provision had not been adopted. Provided, however, that no such credit or offset shall be allowed against any tax payable under the income-tax Act or this Act when such payment is due prior to January 1st, 1931. Acts 1929, p. 116, § 27.

§§ 993½(1)-993½(149). **Park's Code.**

See §§ 993(169)-993(302).

ARTICLE 3

Exemption of Property

§ 998. (§ 762). **Property exempt from taxation.**

Productive Property Taxable.—Under the constitution of this state, productive property is taxable, even though the income be used for charitable purposes. *Atlanta Masonic Temple Co. v. Atlanta*, 162 Ga. 244, 133 S. E. 864.

Illustration—Masonic Lodge.—A masonic company furnishing various city lodges with quarters, by renting and maintaining a building, is not a purely charitable institution within the meaning of this section, although the lodges occupying the building may be institutions of such character. *Atlanta Masonic Temple Co. v. Atlanta*, 162 Ga. 244, 133 S. E. 864.

ARTICLE 4

Persons and Property Subject to Taxation.

§ 1003. **Property shall be returned at its value.**

Power under City Charter.—The power to "lay" and "enforce the payment" of "such taxes on the inhabitants" of, and "those who hold taxable property" in, a city as the "corporate authorities may deem expedient," conferred upon the city by its charter, is not taken away by this section or section 1004. *Tietjen v. Mayor*, 161 Ga. 125, 129 S. E. 653.

§ 1004. **"Fair market value," meaning of.**

See note under section 1003.

In General.—This section merely states a rule to be applied by municipalities in arriving at the value at which taxable property shall be assessed for the purposes of taxation, and does not purport to limit investigations or the manner or agencies by which the municipal authorities shall inquire into such value of taxable property. *Tietjen v. Mayor*, 161 Ga. 125, 131, 129 S. E. 653.

§ 1013. (§ 773). **In what funds taxes are to be paid.**

Where a tax-collector, after accepting a taxpayer's check on a Sparta bank and delivering to her a receipt for payment of State and county taxes, held the check for six days and then indorsed and deposited it in a Gibson bank, which indorsed and sent it to an Atlanta bank, which indorsed and sent it to the Sparta bank for collection, which (on the ninth day after its date) charged the amount of it to the drawer's account and later delivered it canceled to her, having also mailed to the Atlanta bank a cashier's or exchange check, which remained unpaid because before its collection the Sparta bank failed and discontinued business, the taxpayer was not subject to execution issued by the tax-collector for the amount of the tax so paid. *Palmer v. Harrison*, 165 Ga. 842, 142 S. E. 276.

§ 1018. (§ 778). **Taxes charged against whom.**

Origin of Provision as to Life-Tenants.—The latter part of this section, referring to life-tenants and others, who may own and enjoy property, was taken from the decision of this court in *National Bank of Athens v. Danforth*, 80 Ga. 55, 7 S. E. 546, written by Mr. Chief Justice Bleckley. *Pursley v. Manley*, 166 Ga. 809, 816, 144 S. E. 242.

Not Applicable to Land-Drainage Taxes.—This section does not apply to assessments for land-drainage taxes. *Pursley v. Manley*, 166 Ga. 809, 811, 816, 144 S. E. 242. See note to § 4391.

Applied in *Durden v. Phillips*, 166 Ga. 689, 694, 144 S. E. 313; *Planters Warehouse Co. v. Simpson*, 164 Ga. 190, 198, 138 S. E. 55.

ARTICLE 7

County Taxation of Railroads

§ 1041. Affidavit of illegality.—If any railroad company shall dispute the liability to such county tax, it may be done by an affidavit of illegality, to be made by the president of said railroad, or other officer thereof having knowledge of the facts, in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. Acts 1889, p. 29; 1916, p. 34; 1927, p. 137.

Editor's Note.—By the amendment of 1927 other officers than the President having knowledge of the facts, may make the affidavit prescribed by this section.

ARTICLE 8

Estate and Inheritance Taxes

§ 1041(1). Federal Estate Tax return; duplicate to be filed with State Tax Commissioner.—It shall be the duty of the legal representative of the estate of any person who may hereafter die a resident of this State, and whose estate is subject to the payment of a Federal Estate Tax, to file a duplicate of the return which he is required to make to the Federal authorities, for the purpose of having the estate taxes determined, with the State Tax Commissioner. When such duplicate is filed with the said official, he shall compute the amount that would be due upon said return as Federal Estate Taxes under the Act of Congress relating to the levy and collection of Federal Estate Taxes upon the property of said estate taxable in Georgia, and assess against said estate as State inheritance taxes eighty per centum of the amount found to be due for Federal Estate Taxes. Provided, that if after the filing of a duplicate return and the assessment of the State inheritance taxes the Federal authorities shall increase or decrease the amount of the Federal Estate tax, an amended return shall be filed with the State Tax Commissioner, showing all changes made in the original return and the amount of increase or decrease in the Federal Estate tax and such official shall assess against said estate 80 per cent of the additional amount found to be due for Federal Estate tax. In the event of a decrease in the Federal Estate tax, the State shall refund to said estate its proportion of said decrease. Acts 1925, p. 63; Ex. Sess. 1926, p. 15, 16; 1927, p. 103.

Editor's Note.—Supplemental to the Editor's Note under this section in the Code of 1926, the court pointed out in *McAlpin v. Davant*, 163 Ga. 309, 136 S. E. 83, that the act of 1925 does not specifically mention the act of 1913 as amended, and does not expressly repeal that law.

The act of 1925 operates only in the future, and does not conflict with the pre-existing act of 1913 as amended, in so far as that law imposed an inheritance tax upon estates left by decedents who died prior to passage of the act. Consequently the act of 1925 does not authorize the assessment and collection of the inheritance tax therein provided for from estates that were left by decedents who died prior

to the passage of the act. *McAlpin v. Davant*, 163 Ga. 309, 136 S. E. 83.

The amendment of 1926 inserted the word "hereafter" near the beginning of the section, and raised the percentage of the state inheritance taxes from 25% to 80% of the amount of the Federal Estate Taxes. Subsequently, the amendment of 1927 added the proviso, with all that follows it, to the end of the section.

Assessment of Estates Left Prior to 1925.—Where there was no assessment or collection of any inheritance tax upon such estate prior to the passage of the act of 1925, the estate was subject to have an inheritance tax assessed and collected therefrom under the act of 1913 as amended, unaffected by the passage of the act of 1925, and was not subject to a tax under the act of 1925. *McAlpin v. Davant*, 163 Ga. 309, 136 S. E. 83.

§ 1041(2). Duties of County Ordinaries.—When the amount of the of the inheritance taxes to be paid by any estate has been determined, as provided for in § 1041(1), it shall be the duty of said State official to certify the same to the Ordinary of the county where said estate is being administered, who shall enter the same upon the minutes of his Court, and notify the executor or administrator of the amount found to be due, which shall be a charge against the estate and not the several distributive shares. The ordinary shall receive for his services the sum of \$3.00 to be taxed as a part of the cost of administration. The tax assessed under the terms of this Act shall be paid direct to the Comptroller-General. Acts 1925, p. 63; 1927, p. 104.

Editor's Note.—By the amendment of 1927, the provision as to the compensation for the services of the ordinary was inserted; and the tax assessed was made payable to the comptroller general instead of to the county tax collector.

Note that while the act of 1927 purports to amend section 2 and 4 of the act of 1925 it is obvious that 1925 was inserted—Query as to constitutionality.

§ 1041(4). Failure to pay; executions.—Whenever the legal representative of any estate taxable under this Act fails to pay the amount assessed against said estate, within six months after notice from proper authority as to the amount, to be paid it shall be the duty of the Comptroller-General to issue execution for the amount of such tax, against said estate, which execution shall be enforced by levy and sale. Acts 1925, p. 63; 1927, p. 104.

Editor's Note.—The provision as to the enforcement of the execution was added, and the duty formally resting upon the county collector was imposed upon the comptroller general, by the amendment of 1927. See Editor's Note to § 1041(2).

§ 1041(e). Park's Code.

See § 1041(8).

§§ 1041(1-1)-1041(1-2). Park's Code.

See §§ 1041(1)-1041(2).

§ 1041(m). Park's Code.

See § 1041(17).

§ 1041 (8). Tax, how levied on estates less than fee.

Applied in *Lockhart v. State*, 164 Ga. 14, 137 S. E. 549.

§ 1041(r). Park's Code.

See § 1041(17).

§ 1041(17). Tax on transfer of property of non-resident decedent.—A tax of two per centum of its actual value is hereby imposed upon the transfer of the following property of a non-resident decedent:

a. Real or personal property or any interest therein within this State.

b. Shares of stock or registered or coupon bonds or certificates of interest of corporations organized under the laws of this State, or of national banking associations located in this State, or joint stock companies or associations organized under laws of this State.

c. Such tax shall not apply to bonds of this State or any of its subdivisions, or on money deposited in a bank, trust company or other similar institution in this State, if such deposit is owned by a non-resident decedent. Acts 1927, p. 101.

§ 1041(18). Valuation, how made.—The value of any property taxable under the provisions of this Act and the amount of tax imposed thereon shall be determined by the State Tax Commissioner, who shall give notice and an opportunity to be heard to the transferor, administrator, trustee, or other person liable for the payment thereof. The tax shall be imposed upon the transfer of the property situated within this State, and not upon the persons to whom the property is transferred. No deduction shall be allowed from the value of any property taxable under this Act, except an incumbrance upon real property in this State or personal property held within this State as collateral or security for a loan.

§ 1041(19). Time for payments; discount interest.—All taxes imposed by this Act shall be due and payable at the time of the transfer, and shall be paid to the Comptroller-General of the State. If such tax is paid within six months of the death of the decedent a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from date of death, interest shall be charged and collected at the rate of ten per centum from the date of death. The tax herein imposed shall be and remain a lien upon the property transferred until paid, and the transferor, executor, administrator, or trustee of the estate shall be personally liable for such tax.

§ 1041(20). Authority to prescribe rules and forms.—The State Tax Commissioner, with the approval of the Comptroller-General, shall have the power to prescribe such rules and regulations and forms not inconsistent with the terms of this Act as may be necessary to carry out the provisions of this Act.

§ 1041(u). Park's Code.

See § 1041(21).

§ 1041(21). Exemption.—The tax imposed by this Act on personal property (except tangible personal property having an actual situs in this State) shall not be payable if the laws of the State of residence of the decedent at the time of his

death exempted residents of this State from transfer taxes or death taxes on such property.

ARTICLE 9

Income Taxes

§ 1041(22). Corporation net-income tax; exception. U. S. laws followed.—On the net income of every person, firm, or corporation residing or doing business in this State, except insurance companies which pay to the State a tax upon premium income, after making such deductions as are allowed by the laws of the United States in the system by them adopted for determining net incomes and such increases and deductions as are hereinafter provided for in determining a proper taxable income, there shall be levied and collected by the State of Georgia an income tax similar to that of the United States, but at the rate and according to the scale hereinafter set forth; the same to be returned, calculated, ascertained, and paid according to the system and rules hereinafter set forth. Acts 1929, p. 93, § 1.

§ 1041(23). Computation of tax.—Whenever any such person, firm, or corporation residing or doing business in this State makes an income-tax return to the United States, or is legally bound so to do, such person being hereinafter briefly referred to, for convenience, as a taxpayer, it shall be his duty to make at the same time a like return to the State of Georgia and file the same with the State Tax Commissioner for the purpose of a State tax on income. Such duplicate return shall furnish the same information as is contained in his return to the United States, shall be made on a blank form to be furnished by the Tax Commissioner, and shall ascertain the taxable net income in the same way as in the return to the United States; but before ascertaining the net income taxable by the State, the following changes shall be made:

1. To the amount ascertained under the laws of the United States as the net income taxable by the United States, there shall be added in said return the gross amount of any salary received by the taxpayer during the tax year, or accrued to him during said period as a public official or employee of the State, or of any county, municipal corporation, or other political division thereof, and the net amount of any fees, perquisites, or other emolument from said sources or any of them, paid to him during the same period for official compensation, except in the cases of the Governor of the State and of the several Judges of the Supreme Court, the Court of Appeals, and the Superior Court, who shall not be required to include their salaries paid or accruing for any term existing at the time of the passage of this Act.

2. From the amount so ascertained as the taxable net income shall be deducted any salary paid to the taxpayer by the United States or accrued to him from the same source as an official salary for any service rendered by him to

the United States, and any and all interest paid to him on any bond or bonds or other obligation of the United States.

If neither of the changes indicated by subparagraph 1 and 2 above is made, the net income taxable by the State of Georgia shall be the same as that taxable by the United States, and the tax payable thereon to the State of Georgia shall be one third of that payable to the United States. But in case the next taxable income be changed as the result of complying with subparagraphs 1 or 2 above, the tax payable to the State shall be increased or reduced so as to be one third of what would have been payable to the United States under their laws upon such increased or reduced taxable net income. Act 1929, p. 93, § 2.

§ 1041(24). Return by public officer or employee; non-resident corporation.—Any person, firm, or corporation who makes no income-tax return to the United States because of having no sufficient income taxable by the United States to call for such return under the laws of the United States, but who would have such sufficient income if his salary, fees or perquisites from the State or subdivision thereof were taxable by the United States, shall be liable and is hereby required to make to the State of Georgia an original return on the same or similar form as would be used in making a duplicate return as required in the present section indicating in some appropriate way whether the same is an original return. In such case the tax liability to the State shall be one third of what it would be to the United States if said income were by them taxable.

In any case where a non-resident corporation having an office and doing business in this State makes its income-tax return in some other State, such corporation shall make an original return to the Tax Commissioner of Georgia, confined to its business done in this State, upon like principles as are in this section above provided. Acts 1929, p. 94, § 3.

§ 1041(25). Claim of exemption, to be made with return; deductions.—It shall be the right of any taxpayer making return of income for taxation by the State, to attach or add to such return any claim such taxpayer may choose to make as to any item or items included in his return to the United States which he conceives to be exempt from taxation by the State of Georgia. In such case it shall be the duty of the taxpayer so making return to make a clear and distinct statement of all relevant facts connected with such claim, and to make a clear statement of the reasons why he conceives such item to be not taxable by the State. And there shall be deducted any amount that may be derived from incomes of any such persons or companies as the State of Georgia is prohibited from taxing under the Constitution of the United States. Acts 1929, p. 95, § 4.

§ 1041(26). Payment in installments, time of.—When such return is made and filed with the tax commissioner as hereinbefore required, the taxpayer shall, on or before the last day for making return, pay to the Tax Commissioner for the

State of Georgia at least one third of the State income tax as fixed by the provisions hereinbefore made, the balance being due and payable at intervals of three and six months thereafter. Acts 1929, p. 95, § 5.

§ 1041(27). Claim not relieve from immediate payment; refund.—The right granted the taxpayer in section 1041(25) to file a claim of exemption or denial of liability for tax, as to any item included in the return, shall not be construed to relieve the taxpayer from liability to make immediate payment of the tax, nor shall there be any judicial interference with the payment or collection of the tax upon any other ground, but all persons making return as herein provided for, or required so to do, shall pay as hereinbefore provided and make his complaint for or seek a refund as hereinafter provided for. Acts 1929, p. 95, § 6.

§ 1041(28). Board of Income-Tax Review; hearing of claim.—A tribunal is hereby created, consisting of the Comptroller-General, the Attorney-General, and the Secretary of State, which shall be known as the Board of Income Tax Review. Whenever any taxpayer shall make a claim for exemption as to any item or items in his return as provided in section 1041(25) and shall be dissatisfied with the findings of the State Tax Commissioner as to such claim for exemption, the claim shall be by the Tax Commissioner referred to said board. In all returns the taxpayer shall be required to give and shall give his post-office address. Upon receiving such reference the board shall, by letter duly stamped and deposited in the mails, give notice to the taxpayer of the time and place where such claim will be heard and passed on. Said board may in its discretion also cause said notice to be served on the taxpayer by any sheriff or deputy sheriff of this State. If the board has any reason to apprehend that the notice was not received, it shall cause the same to be so served before proceeding. The matter shall be heard at the time and place stated in the notice, unless continued by the board to another time or place, or unless the number of such instances to be heard, or other good cause, makes it necessary to continue from day to day. At the hearing the board shall summarily consider and pass on the claimed exemption, and either allow it or disallow it according as in their judgment the same is or is not so required by the Constitution or laws of this State or of the United States. Acts 1929, p. 96, § 7.

§ 1041(29). Appeal.—The taxpayer for himself, or the Tax Commissioner for the State, shall, if dissatisfied with the finding, have the right to demand an appeal to the Superior Court of Fulton County. Said demand shall be in writing and shall be made within ten days, but no bond shall be required as a condition thereon. No notice shall be necessary on the part of the appellant, but in either event the appellee shall take notice of the appeal at his own peril. Acts 1929, p. 96, § 8.

§ 1041(30). Summary hearing in superior court;

writ of error.—In the Superior Court the cause resulting from such appeal shall be summarily heard in preference to all other matters and without regard to terms of court. From the judgment of the Superior Court a writ of error shall lie as in all other civil cases. Acts 1929, p. 97, § 9.

§ 1041(31). Protest by taxpayer; refund, with interest.—Any taxpayer making return and making payment, either in whole or in part, shall have the right, at the time of said payment, to file, with the person to whom payment is made, a protest in writing; and if thereafter there be a judicial finding in his favor exempting him in whole or in part from liability, it shall be the duty of the Treasurer of this State to repay to such taxpayer, with interest at seven per cent. per annum, any sum improperly required of him, which payment shall be made out of the fund now to be provided for. Acts 1929, p. 97, § 10.

§ 1041(32). Special fund for reimbursements of claimants.—As said income taxes are paid into the treasury, such percentage thereof, not exceeding ten per cent., as shall be deemed prudent and necessary by the Board of Income Tax Review shall be set aside by the treasurer as a special fund for the reimbursement of taxpayers improperly required to pay, and said treasurer shall have authority, whenever a liability is established for repayment in favor of a taxpayer, so to repay out of said fund without other appropriation thereof to that purpose than as contained herein. Acts 1929, p. 97, § 11.

§ 1041(33). Time of return.—The first return for taxes under this article shall be made each year on or before the 15th day of March for the preceding calendar year, but the liability of taxpayers thereunder for the year 1929 shall only be assessed pro rata for one fourth of the year. Acts 1929, p. 97, § 12.

§ 1041(34). Blanks.—The Tax Commissioner shall have authority and it shall be his duty to provide all necessary blanks for carrying out the provisions of this article, which blanks shall be distributed throughout the State in such way as the Tax Commissioner may deem proper. Acts 1929, p. 97, § 13.

§ 1041(35). Summary hearing in Superior Court; writ of error.—The Tax Commissioner shall have power and authority to make all necessary regulations for carrying out the provisions of this article, provided the same are not in conflict with the provisions of this article and do not affect any substantive legal right of the taxpayer resulting therefrom. Acts 1929, p. 98, § 14.

§ 1041(36). Default of taxpayer: penalty, notice to taxpayer before assessment, execution.—Any person, firm, or corporation who shall fail or refuse to make such return as herein required shall be liable to a penalty of twenty-five per cent. of the liability of such taxpayer as fixed by the return and other proceedings, and, in addition thereto, interest at the rate of one per cent. for every calendar month from and after the failure to make return. If such taxpayer, after having so failed or neglected to make return, shall be notified by the Tax Commissioner so to do, and shall thereupon continue so to fail and refuse, the

Tax Commissioner shall give to such taxpayer notice that on a day to be named he will assess the tax from the best information obtainable and after giving the taxpayer opportunity to be heard. In such case the penalty shall be fixed at fifty per cent. upon the amount ascertained and assessed, and may be included as part of tax, and a writ of fieri facias shall be issued for the whole by the Tax Commissioner, bearing teste in the name of the Governor, and directed to all and singular the sheriffs of this State, commanding them to levy on the goods and chattels, lands, tenements, and hereditaments of said taxpayer, which writ it shall be the duty of any sheriff to execute as in case of writs of execution from the Superior Court. Acts 1929, p. 98, § 15.

§ 1041(37). Fraud by taxpayer; punishment.—Should any taxpayer, fraudulently and with a purpose to conceal his liability under this Act, so fail or refuse to make return, or make any false and fraudulent return with a purpose to escape liability, such taxpayer shall, in addition to liability for the penalties herein provided, be liable to prosecution in any court having jurisdiction, and upon conviction shall be deemed guilty of a misdemeanor and punished accordingly. Acts 1929, p. 98, § 16.

§ 1041(38). Affidavit of illegality.—Whenever any writ of fieri facias has issued under section 1041(36) or 1041(37) and the taxpayer shall conceive the same to be illegal, he may tender to the levying officer his affidavit of illegality thereto, and upon his payment of the assessed tax without the penalty the officer shall return the same to the Superior Court of Fulton County, where the same shall be summarily heard as provided in section 1041(28) for appeals, and the judgment thereon shall be final so far as concerns the judiciary of the State. Acts 1929, p. 99, § 17.

§ 1041(39). Reduction of ad valorem tax rate because of revenue from income tax.—That the Governor and Comptroller-General are instructed and directed, in fixing the ad valorem tax rate for State purposes in the year 1931, to make a careful estimate of the amount of revenue that will be derived from the provisions of this article and from other sources of revenue, and, after providing for any deficit that may exist and the payment of current expenses of the State over a two-year period, to reduce the ad valorem tax rate for said year 1931 in proportion to the excess revenue that will be realized under the provisions of this article. Act 1929, p. 99, § 18.

CHAPTER 2

Taxes, How Returned and Collected

ARTICLE 2

Returns to Receiver of Tax Returns

SECTION 2

Wild Lands, and Notice to Non-Residents

§ 1070. (§ 821). Wild lands returned how, and subject to double tax, when.

Assessment Prerequisite to Sale.—Under this section a

tax-collector can not issue an execution for taxes against wild lands not given in for taxes by the owner in the county in which they are located, in the absence of an assessment of said land for taxes in some of the modes provided by law. A sale of such lands under a tax execution not based on such assessment was void, and the purchaser at such sale acquired no title. *Cook v. Turner*, 167 Ga. 671, 146 S. E. 314.

§ 1071. (§ 822). Owners to be notified of returns received.

Cited in *Dunaway v. Gore*, 164 Ga. 219, 226, 138 S. E. 213.

SECTION 9

Double Tax, When Collected

§ 1105. (§ 847). Defaulters to be doubly taxed.

Land Assessed for Owner.—Where the owner of land fails to return it for taxation, under the authority of this section it may be assessed for him. *Wiley v. Martin*, 163 Ga. 381, 382, 136 S. E. 151.

§ 1106. (§ 848). Property not returned to be doubly taxed.

Assessed as Unreturned Property.—If the owner of land fails to return it for taxation, and if the owner is unknown, under the authority of this section it is to be assessed as unreturned property. *Wiley v. Martin*, 163 Ga. 381, 382, 136 S. E. 151.

ARTICLE 2B

Tax Equalization

§ 1116(i). Park's Code.

See § 1116(9).

§ 1116 (9). Qualifications; compensation; removal from office.

This section is not violative of that part of the constitution of this State which provides that no law shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof. *Parks v. Ash*, 168 Ga. 868, 149 S. E. 207.

Nor is the section unconstitutional because it adds other grounds of disqualification to hold the office, which it was not competent for the legislature to make, for the reason that the constitution itself fixes the disqualifications, and the legislature could not add to those. *Parks v. Ash*, 168 Ga. 868, 149 S. E. 207.

§§ 1116(k)-1116(l). Park's Code.

See § 1116(11).

§ 1116(11). Meeting of board; duties.

Effect of Failure to Give Notice.—It is proper to direct a verdict for the plaintiffs in an action to enjoin the collection of taxes where the returns of the plaintiffs were raised without giving the required notice, the plaintiff tendering the amount admitted due. *Smith v. Shackelford*, 163 Ga. 835, 137 S. E. 255.

Abandonment of Demand for Arbitration.—Where the contestant and his arbitrator fail to appear at the place and time fixed for the arbitration the demand for arbitration will be considered as abandoned. *Rogers v. Hamby*, 163 Ga. 771, 137 S. E. 231.

Who May Be Arbitrators.—As to the effect of not objecting to a third arbitrator known by the contestant to be related to the tax collector, see *Rogers v. Hamby*, 163 Ga. 771, 137 S. E. 231.

ARTICLE 3

List of Insolvents and Defaulters

SECTION 1

Insolvent Lists

§ 1118. (§ 860). Insolvent list, by whom allowed.

It was admitted that the tax fi. fas. allowed by the commissioners in *McDuffie v. Wilcox County*, 165 Ga. 164, 140 S. E. 379, did not show a return of "nulla bona" or "no property."

ARTICLE 5

Tax Fi Fas. and Sales

SECTION 1

Lien of Tax Fi. Fas.

§ 1140. (§ 883). Taxes to be first paid.

When Lien Takes Effect.—Property returned or held at the time of giving in is subject to the lien of the State, and can not be divested by sale. *Bibb National Bank v. Colson*, 162 Ga. 471, 473, 134 S. E. 85.

Applies to All Property.— This section applies to all property returned or held by a taxpayer that is subject to taxation under the constitution of this State. *Phoenix Mutual Life Ins. Co. v. Appling County*, 164 Ga. 861, 139 S. E. 674.

Quoted in *Jordan v. Baggett*, 37 Ga. App. 537, 140 S. E. 902; *Planters Warehouse Co. v. Simpson*, 164 Ga. 190, 195, 138 S. E. 55.

§ 1141. (§ 884). Lien of tax not divested by judicial sale.

A sale of property under execution issued from a court of competent jurisdiction does not divest the liens of the State or county for taxes. *Phoenix Mutual Life Ins. Co. v. Appling County*, 164 Ga. 861, 139 S. E. 674.

So a sale of land by the sheriff under a general fi. fa. did not divest the lien of the State and county for the year's taxes of the defendant in such process. *Planters Warehouse Co. v. Simpson*, 164 Ga. 190, 195, 138 S. E. 55.

Applied in *Durden v. Phillips*, 166 Ga. 639, 694, 144 S. E. 313; *Miller v. Jennings*, 168 Ga. 101, 102, 147 S. E. 32.

SECTION 3

Transfer of Tax Fi. Fas.

§ 1145. (§ 888). Transfer of tax fi. fas.

Recordation—As to Defendant.—The ground that the transfer of a tax fi. fa. to its present owner was not entered of record as provided for by this section is without merit, since such recording is not necessary to make it binding on the property of the taxpayer; nor is such recording necessary to preserve its priority, except as to subsequent bona fide purchasers for value. *Lewis v. Moultrie Bkg. Co.*, 36 Ga. App. 347, 136 S. E. 554.

Transfer by Constable.—In *Thomas v. Lester*, 166 Ga. 274, 142 S. E. 870, after quoting this section it is said: "It follows that the transfer by the constable of the tax fi. fa. in this case, which exceeded in amount one hundred dollars, was void, and the same could not be enforced by the

transferee by levy and sale of the property of the defendant in the tax fi. fa.," citing *Johnson v. Christie*, 64 Ga. 117; *Hill v. Georgia State B. & L. Association*, 120 Ga. 472, 47 S. E. 897; *Thompson v. Adams*, 157 Ga. 42, 120 S. E. 529; *Cook v. Powell*, 160 Ga. 831(12), 129 S. E. 546. Applied in *Phoenix Mutual Life Ins. Co. v. Applying County*, 164 Ga. 861, 139 S. E. 674.

Cited in *Jordan v. Baggett*, 37 Ga. App. 537, 140 S. E. 902.

SECTION 4

Dormancy of Tax Fi Fas

§ 1147. (§ 890). Tax fi. fa. dormant, when.

No Contractual Lien to Prevent Bar.—In cases of tax fi. fas. there is no contractual lien, fixing a period of limitation different from that provided by the statute, to fall back on, so as to prevent the bar of the dormant-judgment act. *Lewis v. Moultrie Bkg. Co.*, 36 Ga. App. 347, 350, 136 S. E. 554.

When Plaintiff Subrogated to Rights of State.—An action brought to enforce the lien of the State and County for taxes, to which the plaintiff became subrogated was not barred by this section, as the lien can be enforced within seven years from its accrual, although it would be barred as an action for money had and received by the defendant in the tax fi. fa. from the plaintiff. *Thomas v. Lester*, 166 Ga. 274, 142 S. E. 870.

SECTION 10

Claims, How Interposed

§ 1159. (§ 899). Claim may be interposed when tax fi. fa. is levied.

Property Subject to Fi. Fa.—The remedy of claim as provided by this section is not available where the property is subject to the fi. fa. levied thereon. *Jordan v. Baggett*, 37 Ga. App. 537, 140 S. E. 902.

SECTION 13

Levy and Sale under Tax Fi. Fas.

§ 1164. (§ 904). Purchase by one bound to pay.

This section is not applicable where the purchaser at the tax sale is not the person bound to pay the tax, but another, who is in no way bound for its payment, and who purchases it upon his own account; nor is such principle applicable where such purchaser at the tax sale conveys the property to another, although the latter buys the property for the use of the taxpayer, to whom she agrees to convey it upon the payment to her by the taxpayer of the amount which she is out upon the purchase, when such amount has not been paid. *Miller v. Jennings*, 168 Ga. 101, 147 S. E. 32.

§ 1165. (§ 905). By whom levied, and sales under.

See note to § 1145.

SECTION 15

Redemption of Property Sold for Taxes

§ 1169. Land sold may be redeemed.

The Premium.—This section and section 1173 show that

the legislature had in mind a difference between interest at a stated rate per annum and a premium in the form of a lump sum to be paid within the time in which the different classes of property could be redeemed, and that it so declared. *Reynolds v. Bickers-Goodwin Co.*, 161 Ga. 378, 379, 131 S. E. 55. Section 1173 specifically states that the interest shall be at a stated rate per annum, the absence of such a provision in this section negatives the assumption that payment should be in the same manner. Id.

Same—Time of Payment.—The premium provided for means payment of ten per cent in addition to the amount of purchase-money, without regard to the time elapsing between the sale and the redemption. *Reynolds v. Bickers-Goodwin Co.*, 161 Ga. 378, 131 S. E. 55.

Execution to Meet Interest, Principal, or Cost of Draining.—The right of redemption is not given where land is sold under execution issued for an assessment to meet interest or principal, or the cost of draining the land in a drainage district. *Sigmon-Reinhardt Co. v. Atkins Nat. Bank*, 163 Ga. 136, 137, 135 S. E. 720.

§ 1170. Effect of redemption.

Redemption of land sold for taxes, and taking quitclaim deed from purchaser, does not vest title in holder of security deed to the land who redeemed it, though period for redemption had passed. Lien acquired thereby. *Johnson v. King Lumber Co.*, 39 Ga. App. 280(4), 147 S. E. 142.

§ 1172. Quitclaim deed by purchaser.

Execution to Pay Interest, Principal, or Costs of Draining.—Where land is sold under execution issued for an assessment to meet interest, principal, or costs of draining the land in a drainage district, the vendee will not be required to execute and deliver a quitclaim deed, as provided in this section. *Sigmon-Reinhardt Co. v. Atkins Nat. Bank*, 163 Ga. 136, 135 S. E. 720.

§ 1173. (§ 910). How redeemed.

See notes to section 1169.

CHAPTER 3

Delinquent Tax Receivers and Collectors

ARTICLE 2

Execution Against Defaulting Receiver or Collector or Sureties

§ 1187. (§ 924.) Comptroller to issue executions vs. collector and sureties on default.

Quoted and applied in *State v. Bank*, 162 Ga. 292, 133 S. E. 248.

Cited in *American Surety Co. v. Kea*, 168 Ga. 228, 147 S. E. 386.

§ 1190. (§ 927). Lien on property of principals and sureties, bound.

Superiority of State's Lien.—The State's lien is superior to a security deed for money borrowed by the collector to pay a prior shortage. *State v. Bank*, 162 Ga. 292, 133 S. E. 248.

Subrogation of Securities.—A bank, lending money to a collector to cover a shortage, is not entitled to a superior lien on account of subrogation to the rights of the State. *State v. Bank*, 162 N. C. 292, 133 S. E. 248.

ARTICLE 5

Tax Collectors

SECTION 2

Tax-Collectors' Bonds

§ 1207. (§ 945). Amount of bonds and their conditions.

The requirement of this section that the tax-collector shall give bond "payable to the ordinary," should not be construed so as to require that such bond be made payable to the ordinary as such, but rather to the officer having charge of the financial affairs of the county and jurisdiction of county matters; and thus construed, our ruling does not give effect to a local law on a subject for which provision has been made by an existing general law, as forbidden by § 6464. *Payne v. Royal Indemnity Co.*, 168 Ga. 77, 79, 147 S. E. 95.

SECTION 7

Collector, When Ex Officio Sheriff

§ 1225. Collector ex-officio sheriff in some counties. — The tax-collectors of counties which contain a population of one hundred and fifty thousand or more shall be ex-officio sheriffs in so far as to enable them to collect the taxes due the State and county, by levy and sale under tax executions; and said tax-collectors shall not turn over any tax executions to the sheriffs, or to any other levying officials of the said State, except when it may become necessary, for the purpose of enforcing the same, to send said executions to any other county or counties than that in which issued; but said tax-collectors, by virtue of their office, shall have full power and authority to levy all tax executions heretofore or hereafter to be issued by them in their respective counties; and the compensation of said tax-collectors shall not exceed fifty cents for issuing each fi. fa., and for levying and selling the same fees as are now allowed by law to sheriffs of said State; and said tax-collectors shall have full power to bring property to sale, and sales made by them shall be valid, and shall convey the title to property thus sold as fully and completely as if made by the sheriffs of said counties. Acts 1929, p. 157, § 2.

Editor's Note.—Prior to the amendment of 1927, the tax collectors of only the counties which contain a population of one hundred and twenty five thousand or more, fell within the scope of this section.

Note that this section is twice amended by the Acts of 1927—the latter amendment taking no account of the former.

Judicial Notice of Population.—The courts will take judicial cognizance of the population of counties for the purpose of determining whether this section is applicable therein. *Fidelity, etc., Co. v. Smith*, 35 Ga. App. 744, 746, 134 S. E. 801, citing the following authorities: *Leadbetter v. Price*, 102 Ore. 159 (199 Pac. 633, 17 A. L. R. 218); *Standard Oil Co. v. Kearney*, 106 Neb. 558 (18 A. L. R. 95, 184 N. W. 109); 15 R. C. L. 1129.

§§ 1225(a)-1225(b). Park's Code.

See §§ 1227(1)-1227(6).

§ 1227(1). Counties with populations of 7,320.

—All tax-collectors of such counties of the State of Georgia as have a population of not less than 7,320, nor more than 7,330, according to the census of the United States for the year 1924, shall be ex-officio sheriffs of their respective counties, in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them, by levy and sale under tax executions, and that said tax-collectors be vested with full power and authority to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this Act, and that the compensation to be received by said tax-collectors for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs for the same or like services; that said tax-collectors shall have the powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all necessary conveyances or bills of sale or other instruments required by law of sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other Acts and to exercise all other powers vested in sheriffs with respect to the levy of said fi. fas., the sale of property thereunder, and the execution of conveyances therefor, or with respect to any other feature connected with the collection of said fi. fas. by levy and sale, and all sales made by them as ex-officio shall pass title and be as valid in all respects as if made by the sheriffs of the respective counties. Acts 1927, p. 335.

§ 1227(2). Same—Advertisements of sales.—In the levy of said fi. fas., and in the making of the sales thereunder, in the advertisement of said sales, said tax-collectors shall in all respects conform to the provision of the law governing such sales by the sheriffs of this State, and all advertisements of sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriff's advertisements for said county are published, and shall be published for the same period of time.

§ 1227(3). Same—Deputies.—Said tax-collectors shall have powers to appoint one or more deputies under the provision of this Act, and all deputies thus appointed shall be vested with all of the powers herein granted unto the tax-collectors, and said tax-collectors shall be responsible for the Acts of their said deputies as sheriffs are liable for the Acts of their deputies, and the compensation of such deputies shall be paid by said tax-collector.

§ 1227(4). Counties with population of 15,160.—All tax-collectors of such counties of the State of Georgia as have a population of not less than 15,150 and not more than 15,160, according to the census of the United States for the year 1920, shall be ex-officio sheriffs of their respective counties in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them, by levy and sale under tax executions, and that said tax-collectors be vested with full power and authority

to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this Act, and that the compensation to be received by said tax-collectors for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs for the same or like services; that said tax-collectors shall have the powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all necessary conveyances or bills of sale or other instruments required by law of sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other Acts and to exercise all other powers vested in sheriffs with respect to the levy of said fi. fas., the sale of property thereunder, and the execution of conveyances therefor, or with respect to any other feature connected with the collection of said fi. fas., by levy and sale, and all sales made by them as ex-officio sheriffs shall pass title and be as valid in all respects as if made by the sheriffs of the respective counties. Acts 1927, p. 337.

§ 1227(5). **Advertisements of sales.**—In the levy of said fi. fas., and in the making of the sales thereunder, in the advertisement of said sales, said tax-collectors shall in all respects conform to the provisions of the law governing such sales by the sheriffs of this State, and all advertisements of sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriff's advertisements for said county are published, and shall be published for the same period of time.

§ 1227(6). **Same—Deputies.**—Said tax-collectors shall have power to appoint one or more deputies under the provision of this Act, and all deputies thus appointed shall be vested with all of the powers herein granted unto the tax-collectors, and said tax-collectors shall be responsible for the Acts of their said deputies as sheriffs are liable for the Acts of their deputies, and the compensation of such deputies shall be paid by the said tax-collectors.

§ 1227(7). **In counties of 15,275 to 15,300 population.**—All tax-collectors of such counties of the State of Georgia as have a population of not less than 15,275 and not more than 15,300, according to the census of the United States for the year 1920, shall be ex-officio sheriffs of their respective counties in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them, by levy and sale under tax-executions, and that said tax-collectors be vested with full power and authority to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this Act, and that the compensation to be received by them for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs for the same or like services; that said tax-collectors shall have the powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all necessary conveyances or bills of sale or other instruments re-

quired by law of sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other acts and to exercise all other powers vested in sheriffs with respect to the levy of said fi. fas., the sale of property thereunder, and the execution of conveyances therefor, or with respect to any other feature connected with the collection of said fi. fas. by levy and sale, and all sales made by them as ex-officio sheriffs shall pass title and be as valid in all respects as if made by the sheriffs of the respective counties. Act 1929, p. 326, § 1.

§ 1227(8). **Same—Advertisement.**—In the levy of said fi. fas., and in the making of sales thereunder, in the advertisement of said sales, said tax-collectors shall in all respects conform to the provisions of the law governing such sales by the sheriffs of this State, and all advertisements of such sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriff's advertisements for said county are published and shall be published for the same period of time. Act 1929, p. 327, § 2.

§ 1227(9). **Same—Deputies.**—Said tax-collectors shall have power to appoint one or more deputies under the provisions of this Act, and all deputies thus appointed shall be vested with all the powers herein granted unto the tax-collectors, and said tax-collectors shall be responsible for the acts of their said deputies as sheriffs are liable for the acts of their deputies, and the compensation of such deputies shall be paid by said tax-collectors. Act 1929, p. 327, § 3.

§ 1227(10). **Counties of 10,590 to 10,600 population.**—All tax-collectors of such counties of the State of Georgia as have a population of not less than 10,590 nor more than 10,600, according to the census of the United States for the year 1920, shall be ex-officio sheriffs of their respective counties, in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them by levy and sale under tax-executions, and that said tax-collectors be vested with full power and authority to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this Act, and that the compensation to be received by said tax-collectors for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs for the same or like services; that said tax-collectors shall have the powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all necessary conveyances or bills of sale or other instruments required by law of sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other acts and to exercise all other powers vested in sheriffs with respect to the levy of said fi. fas., the sale of property thereunder, and the execution of conveyances therefor, or with respect to any other feature connected with the collection of said fi. fas. by levy and sale, and all sales made by them as ex-officio shall pass title and be as valid in all

respects as if made by the sheriffs of the respective counties. Act 1929, p. 328, § 1.

§ 1227(11). Same—Advertisement.—In the levy of said fi. fas., and in making of the sales thereunder, in the advertisements of said sales, said tax-collectors shall in all respects conform to the provision of the law governing such sales by the sheriffs of this State, and all advertisements of sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriff's advertisements for said county are published, and shall be published for the same period of time. Act 1929, p. 328, § 2.

§ 1227(12). Same—Deputies.—Said tax-collectors shall have power to appoint one or more deputies under the provision of this Act, and all deputies thus appointed shall be vested with all of the powers herein granted unto the tax-collectors, and said tax-collectors shall be responsible for the Acts of their said deputies as sheriffs are liable for the Acts of their deputies, and the compensation of such deputies shall be paid by the said tax-collectors. Act 1929, p. 329, § 3.

§ 1227(13). In counties of 6,458 to 6,462 population.—All tax-collectors of such counties of this State as have a population of not less than 6,458 and not more than 6,462 according to the census of the United States of 1920, shall be ex-officio sheriffs of their respective counties in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them, by levy and sale under tax-executions, and that said tax-collectors be vested with full power and authority to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this act, and that the compensation to be received by such tax-collectors for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs of such counties for the same or like services; that said tax-collectors shall have powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all conveyances or bills of sale or other instruments required of such sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other acts and to exercise all other powers vested in sheriffs of such counties with respect to any other feature connected with the collection of said tax fi. fas. by levy and sale, and all sales made by them as ex-officio sheriffs of such counties shall pass title and be valid in all respects as if made by the sheriffs of such respective counties. Acts 1929, p. 330, § 1.

§ 1227(14). Same—Advertisement.—In the levy of said fi. fas. and in the making of the sales thereunder, in the advertisement of said sales, said tax-collectors shall in all respects conform to the provisions of the law governing such sales by the sheriffs of this State, and all advertisements of sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriffs of such counties advertise their sales, and

shall be published for the same period of time. Acts 1929, p. 330, § 2.

§ 1227(15). Same—Deputies.—Such tax-collectors shall have power to appoint one or more deputies under the provisions of this Act, and all deputies thus appointed shall be vested with all the powers herein granted unto the tax-collectors, and shall be removable at any time by said tax-collector, for or without cause, and said tax-collectors shall be responsible for the acts and conduct of said appointed deputies as sheriffs are liable for the acts of their deputies, and may, if they see fit, require bond of such deputies, and the compensation of such deputies shall be paid by such tax-collectors. Acts 1929, p. 331, § 3.

§ 1227(16). In county of 14,493 to 14,495 population.—In all counties of this State having a population of not less than 14,493 nor more than 14,495, according to the United States census of 1920, where such county shall have availed itself of the rights conferred under paragraph 1, section 3, article 11, of the Constitution of this State by merging or consolidating the offices of tax-receiver and tax-collector and creating the office of county tax-commissioner, said county tax-commissioners in such counties shall be ex-officio sheriffs of said counties in so far as to give them power to collect the taxes due the State of Georgia and their respective counties by levy and sale of property under tax-executions; and said county tax-commissioners shall not turn over the tax fi. fas. issued by them to the sheriffs of their respective counties, or to any levying officer of said State, except when it may be necessary to enforce the collection of any fi. fa. to forward the same to some other county or counties than the county in which same is issued, but said tax-commissioners by virtue of their office shall have power and authority to levy all tax-executions heretofore or hereafter issued by them in their respective counties; and the compensation of said county tax-commissioners of said counties for their services as ex-officio sheriffs shall be the same as that now allowed the sheriffs or constables for similar services; and said county tax-commissioners shall have power and authority to bring any and all property to sale, and all sales made by them, including the executions of deeds and conveyances of both real and personal property, shall be valid and as binding as if the sale were made by the sheriffs of said counties, and shall pass the title to all property sold as fully as titles are now passed by sheriffs of this State under sales made by them. Provided further, that in all counties where such county tax-commissioners shall receive regular salary, all fees assessed and collected by them in connection with such services shall be paid into the county treasury. Acts 1929, p. 331.

CHAPTER 4A

Payment of Revenue into Treasury

§§ 1248(a)-1248(g). Park's Code.

See §§ 1248(1)-1248(7).

§ 1248(1). Money collected by departments, etc., for maintenance, to be paid into State treasury.—It shall be the duty of every department, commission, bureau, and other branch or agency of the government of this State, and of every official head of every department, commission, bureau, and other branch or agency of the government of this State created by special Act, the support and maintenance of which has been provided by special Act and not by direct appropriations of the General Assembly, to collect and forthwith to pay into the State treasury all moneys, fees, commissions, penalties, or other charges which they are authorized by law to collect for the support and maintenance of such department, commission, bureau, or other branch or agency of the State Government. Acts 1927, p. 311.

§ 1248(2). Expenses of maintenance to be paid from treasury.—The costs and expenses of the maintenance and support of every department, commission, bureau, and other branch or agency of the State government shall be paid out of funds in the State treasury by warrant of the Governor drawn on appropriations duly made by the General Assembly.

§ 1248(3). Exceptions.—The provisions of this Act shall not apply to boards and fees collected by the educational institutions of this State; and such funds as may be derived from sale of farm products, nor funds collected from sale of farm produce equipment or other material derived from the expenditure of Federal research funds, nor to funds received by the Health Department for sale of medical supplies, nor fees received by health institutions, nor to gifts, donations and internal income received by said educational institutions; nor shall the provisions of this Act apply to the Court of Appeals or Supreme Court.

§ 1248(4). Exception of funds collected to match Federal aid funds.—Wherever by Act of Congress conditions have been or may be prescribed for matching Federal aid by State funds, and such conditions are in conflict with the provisions of this Act, then the department or bureau or agency of this State having to do with such Federal aid and collecting funds with which to match such Federal aid may and it is hereby authorized to withhold from depositing in the Treasury an amount sufficient for matching such Federal aid; but all other funds belonging to the State collected by such department, bureau, or agency of the State shall be paid into the State Treasury, as hereinbefore provided.

§ 1248(5). Time of payment to treasury.—It shall be and it is hereby made the duty of each and every official head described in section 1248(1) to pay over and to deposit in the State Treasury, on or before January 1, 1928, all sums remaining in their hands, collected before said date, and remaining undisbursed under existing laws.

§ 1248(6). Appropriation or allocation of certain funds not affected.—Nothing in this Act

shall be construed to affect the appropriation or allocation of the motor-vehicle fees and licenses and pro rata of gasoline taxes to the State Highway Department; nor shall it be construed to affect the appropriation or allocation of the pro rata of gasoline taxes to the counties of this State; nor shall it be construed to affect the appropriation or allocation of the proceeds of the cigar and cigarette taxes to the payment of pensions. Nor shall this Act be construed to affect either the appropriation and allocation of the proceeds of the tax on lumber dealer or dealers in other forest products to the State forestry fund, or the allocation of the proceeds of fees and penalties to State game and fish protection fund; and provided further, that as to those departments, branches, agencies, commissions, and bureaus of State government who under the law can only assess a sufficient amount of fees, licenses, penalties, etc., to support such department, commission, board, bureau, agency, or branch of government, all assessments levied for such support shall be the maintenance appropriation of such department, board, bureau, agency, or branch for each year. None of the provisions of this section shall be construed to exempt or except any of the funds, taxes, monies, fees, commissions, penalties, or other charges received, collected, or paid into any of the agencies named in this section from the requirement of section 1248(1) that they shall all be paid into the State Treasury.

§ 1248(7). Penalty for violation of Act.—Should the official head of any department, commission, bureau, or other branch or agency of the State government violate any of the provisions hereof, he or she shall, upon conviction, be deemed guilty of a misdemeanor and punished as provided therefor, and in addition thereto shall be thereafter ineligible to hold such office.

CHAPTER 5

State Depositories

§ 1249. (§ 982). State depositories provided for in various cities.—The Governor shall name and appoint a solvent chartered bank of good standing and credit in each of the following cities and towns, to wit: In Atlanta (nine depositories), Athens, Augusta, Columbus, Macon (four depositories), Savannah, Rome, Americus, Albany, Hawkinsville, Gainesville, Griffin, LaGrange, Thomasville, Newnan, Cartersville, Dalton, Valdosta, Milledgeville, Darien, Dawson, Cordele, Marietta, Richland, Millen, Warrenton, Carrollton, Elberton, Monticello, Fort Gaines, Cedartown, Jackson, Harmony Grove, Thomaston, Covington, Blackshear, Waycross, Brunswick, Forsyth, Jefferson, Washington, Quitman, Greenville, Eastman, Moultrie, Toccoa (two depositories) 3, Statesboro, Tifton, Lawrenceville, Douglas, Dublin, Madison, Tennille, Sylvania, McRae, Cornelia, Fitzgerald, Bainbridge, Blue Ridge, Mt. Vernon, Barnesville, Baxley, Hartwell, LaFayette, Louisville, Montezuma, Pelham, Sandersville, Swainsboro, Thomson, Winder, Calhoun, Jesup, Lavonia, Donaldsonville, Claxton, Ashburn, Nashville, Blakely,

Dallas, Perry, Fort Valley, Sparta, Reidsville, Comer, Fayetteville, Ludowici, Senoia, Cochran, Conyers, Hazelhurst, Lyons, Ocilla, Talbotton, Bremen, Butler, Cairo, Franklin, Tallapoosa, Georgetown, Gibson, Jonesboro, Jeffersonville, McDonough, Ringgold, Rochelle, Pembroke, Chipley, Colquitt, Guyton, Homerville, Jasper, Summerville, Douglasville, Canton, Edison, Gordon, Alpharetta, Decatur, Eatonton, Fairburn, Lumpkin, Reynolds, Rockmart, Shellman, Uvalda, Lincolnton, Sylvester, Temple, Boston, Blairsville, Buford, Camilla, Dahlonga, Ellaville, Irwinville, Kingsland, Manchester, Springfield, Woodbury, Wrightsville, Metter, Rebecca, Vidalia, Cummings, Vienna, Adel, Soperton, Glenwood, Greensboro, Morgan, Pearson, Willacoochee, Alma, Alston, Arlington, Ellijay, Monroe, Crawford, Collins, Waynesboro, Folkston, Alamo, Lakeland, Buchanan, and Dexter, which shall be known and designated as State Depositories; provided that in each of said cities having a population of not less than six thousand (6,000) and not more than fifteen thousand (15,000), according to the United States Census of 1920; and provided further, that in each of said cities having a population of less than six thousand (6,000) but located in counties having a population of more than thirty thousand (30,000), according to the United States Census of 1920, the Governor may name and appoint not more than two chartered banks of good standing and credit, which shall be known and designated as State Depositories. Provided further, that in each of said cities in the State of Georgia having a population of fifteen thousand (15,000) and over, according to the United States Census of 1920, the Governor may name and appoint not more than three solvent chartered banks of good standing and credit, which shall be known and designated as State Depositories. Provided, that in each city in Georgia having a population of not less than 6,180 and not more than 6,200, and also in each city in Georgia having a population of not less than 11,554 and not more than 11,560, the Governor may name and appoint one additional depository to those now provided by law and under the terms of the general law governing bank depositories. Acts 1929, p. 159, § 1; p. 161, § 1; p. 162, § 1.

§ 1259. (§ 992). Funds subject to check, etc.
As to county depositories, see § 855(2).

ELEVENTH TITLE

Education

CHAPTER 1

The University of Georgia and Its Organization

ARTICLE 2

Branches of the University

§ 1397 (§ 1300). Branches of the University.
The name of the State Normal School was changed to The

Georgia State Teacher's College by the acts of 1927, p. 171. A college of agricultural and mechanical arts, to be known as the Middle Georgia Agricultural and Mechanical Junior College was added as a branch by the acts of 1927, p. 161. The name of the Georgia Normal School was changed to South Georgia Teachers' College by the acts of 1929, p. 186. And by acts 1929, p. 195, the name of the South Georgia Agricultural and Mechanical College was changed to Georgia State College for Men.

CHAPTER 4

Public School System

§ 1437(a). Park's Code.

See § 1551(81).

§ 1437(b-1). Park's Code.

See § 1551(84½).

§§ 1437(i)-1437(j). Park's Code.

See §§ 1551(89)-1551(90).

§ 1437(o). Park's Code.

See § 1551(96).

§§ 1437(p), 1437(q). Park's Code.

See §§ 1551(98)-1551(99).

§ 1437(r). Park's Code.

See § 1551(97).

§ 1437(s). Park's Code.

See § 1551(100).

§ 1437(w). Park's Code.

See § 1551(104).

§ 1437(jj). Park's Code.

See § 1551(118).

§ 1438(a). Park's Code.

See § 1551(125).

§ 1438(h). Park's Code.

See § 1551(133).

§ 1438(m). Park's Code.

See § 1551(141).

§ 1438(y). Park's Code.

See § 1551(153).

§ 1438(aa). Park's Code.

See § 1551(130).

§§ 1438(bb), 1438(cc). Park's Code.

See § 1551(136).

§ 1438(mm). Park's Code.

See § 1551(154a).

§ 1438(nn). Park's Code.

See § 1551(154b).

§ 1438(oo). Park's Code.

See § 1551(154c).

§ 1439(a). Park's Code.

See § 1551(155).

§ 1439(c). Park's Code.

See § 1551(157).

§ 1444(d). Park's Code.

See § 1551(195).

SECTION 1

Taxation and School Funds

§ 1551(6a). \$20,000 a month from commissioners of roads and revenue payable in counties of 200,000 population.—The board of commissioners of road and revenues of each county in the State of Georgia, having a population of not less than 200,000, is hereby authorized to pay over to the county board of education of such county any sums not to exceed \$20,000 each month out of any funds in the treasury of the said county, which shall have been derived from any source other than from taxation. Such funds when paid to the county board of education shall become a part of the county school fund, and may be used by the board of education for paying teachers' salaries buying or renting lots and buildings for school purposes, purchasing or building school buildings maintaining school property, or for any other education purpose not inconsistent with the laws of this State. Acts 1929, p. 225.

ARTICLE 4

State School Superintendent, His Powers and Duties

§ 1551 (72). School year coincident with calendar year; annual statement.

The scholastic year being coincident with the calendar year (Ga. L. 1919, pp. 288, 316, Michie's Code 1926, § 1551-(72)), an election held on November 10, 1927, authorizing the levy of a tax for a local school district, did not authorize the assessment and levy of a school tax in the year 1927 and the issuance of an execution therefor, and the court below did not err in enjoining the levy of such execution. Woods v. Miller, 163 Ga. 259, 147 S. E. 74.

ARTICLE 5

County Boards of Education

§ 1551 (81). School districts.

See sec. 1551(141).

§ 1551(84½). Compensation of members in certain counties.—Members of the county boards of education, in counties having above 200,000 population according to the last or any future United States census, may be paid a salary of fifty dollars (\$50.00) per month each; and their accounts for service shall be submitted for approval each month to the county superintendent of schools, and they shall not receive any other compensation for said service. Acts 1927, p. 156.

§ 1551 (89). School terms; schools property; separation of races.

Editor's Note.—The Supreme Court in *Dominy v. Stanley*, 162 Ga. 211, 216, 133 S. E. 245, in construing section 1484 of the Civil Code, which forms that part of this section beginning "The said boards are invested with the title" etc., and ending with the words "according to the order of the board," used the following language: "This section, however, confers no authority upon the board of education of the county to control or to sell and dispose of the land in question, which was given by private parties for a specific purpose [i. e., a charitable trust]. Moreover, we do not think that the doctrine of cy pres can be so extended as to allow the trustees, who have no title to this property, to sell the same or cut down the timber on the same for the purpose of building up an entirely different institution in an entirely different neighborhood."

It will be noticed that in this case the court was construing a section of the old law contained in sections 1532-1551 of the Civil Code, which sections are superseded by section 1551(1) et seq. For a full treatment concerning the confusion arising out of construction of the former law see Editor's Note under sections 1432-1551, Georgia Code of 1926.

Length of Terms.—The county board has power, after having specified the duration of a particular term, to pass a resolution, after expiration of six months of such term, closing the term prior to the time originally provided for expiration of the term. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

Same—Effect of Promise to Commissioners.—The board of commissioners of a county has no power to contract with the county board of education as to bind the board of education to operate the schools for any particular time, and the board of education will not be bound by any promise to the board of county commissioners in regard to the length of time it will operate the public schools at any term. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

Same—Closing Early to Apply Fund to Prior Indebtedness.—On the facts of this case, the board of education did not abuse its discretion in closing a term earlier than originally planned, and in applying the funds derived from local taxation to payment of the debts accumulated during previous years for money borrowed to pay teachers and operate the schools. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

§ 1551 (90). Powers of county boards as school court.

Constitutionality. — This section is not void on the ground that it is in violation of the constitution of Georgia, §§ 6379, 6497, or the due process clause. Lott v. Board of Education, 164 Ga. 863, 139 S. E. 722.

§ 1551 (96). Consolidation.

Name of New District.—Where two or more local school districts are consolidated, it is not necessary that the word "consolidated" appear as a part of the name selected for the consolidated district; and it is proper for a proceeding to validate bonds to be conducted in the name of the district as fixed by the proper school authorities. Hawthorne v. Turkey Creek School Dist., 162 Ga. 462, 134 S. E. 103.

§ 1551 (97). Appropriation for consolidated schools.—Beginning with the year 1927 the State Superintendent of Schools shall set aside \$350,000 or so much thereof as may be necessary, and for 1928 and the years to follow the State Superintendent of Schools shall set aside \$400,000 or so much thereof as may be necessary, from funds

derived from the poll-tax collected and paid into the treasury, to aid in the establishment and maintenance of consolidated school in this State. When the county board of education shall combine smaller schools into a standard or approved consolidated school with at least four teachers, and evidence of this fact is furnished by the County School Superintendent and Board of Education to the State Superintendent of Schools, and when it is made to appear to the State Superintendent of Schools that aid is needed to support such consolidated school, the State Superintendent of Schools shall be authorized to transmit \$500.00 annually to the support of such school.

If in addition the local school authorities provide for an approved or standard four-year high school, and evidence of this fact is made to appear to the State Superintendent of Schools, that aid is needed to support said four-year high school, the State Superintendent of Schools shall be authorized to transmit \$1,000.00 annually to the support of said school; such funds in both cases shall be used by local authorities in the payment of salaries of principal and teachers.

When two or more schools in any county qualify under this Act, either for the \$500.00 aid or for the \$1,000.00 aid, the State Superintendent of Schools shall determine to which one of such schools said sums shall be paid; the State Superintendent of Schools shall be governed in his decision by the extent to which the consolidated district has utilized its local ability in building, equipping, and supporting its school, and the number of children to be reached by the consolidation, the number of teachers, the qualifications of the teachers employed, and the character of the work being done by the school. No county now receiving, or that may hereafter receive, aid for both the consolidated (\$500.00) and the high-school (\$1,000.00) aid shall be eligible to further apply for such aid until every county in the State has had an opportunity to apply. If those counties not receiving both aids fail to qualify, then the State Superintendent of Schools is authorized to extend further aid to those counties receiving either or both aids as provided in this bill, and on same conditions as set forth above. Acts 1925, p. 147; 1927, p. 158.

Editor's Note. — The amendment of 1927 increased the amounts to be set aside by the superintendent of schools. About the middle of the third paragraph, the phrase "the qualification of the teachers employed" was inserted by the same amendment.

§ 1551 (98). Division of school districts.

Effect of Previous Election When District Divided. — Where the county board of education has duly divided one school district into two school districts, under the provisions of the act, act of 1911, (similar to this section) one of the districts so created may have an election for local school taxation under the statute, although an election for such purpose has been held during the same year and failed to carry in the old district as constituted before the division. *Tyson v. Board*, 150 Ga. 247, 103 S. E. 158; *Dutton v. Rahn*, 162 Ga. 189, 190, 132 S. E. 756.

§ 1551 (99). Rearrangement of districts.

Constitutionality.—This section is not in violation of section 6358 of the constitution. *Lott v. Board of Education*, 164 Ga. 863, 139 S. E. 722.

General Consideration.—The consolidation of school districts is a part of the political power of the State, which the legislature has seen fit to confer upon the county board of education, with a referendum to the voters of

the consolidated districts to approve or disapprove the consolidation, under the provisions of this section above referred to; and without some provision made by statute for a review in equity of the decision of the county board of education, the remedy by popular vote is the only one open to patrons of one or more of the schools so consolidated, who are dissatisfied with the consolidation. *Board of Education v. Hudson*, 164 Ga. 401, 138 S. E. 792, citing *Skrine v. Jackson*, 73 Ga. 377; *Caldwell v. Barrett*, Id. 604, 607; *Ivey v. City of Rome*, 129 Ga. 286, 58 S. E. 858; *Clark v. Board of Education*, 162 Ga. 439, 134 S. E. 74; *Heath v. Bellamy*, 15 Ga. App. 89, 82 S. E. 665.

Election in District Affected.—Where two consolidated school districts are formed by a resolution of the county board of education, and it is provided in such resolution that a named district shall be divided and a designated portion added to one of the districts thus formed and a designated portion added to the other such district, and legal objections are made protesting against the formation of only one of such consolidated districts, the county superintendent should call and hold the subsequent election provided by law only in the district or districts affected by the consolidation to which the objections relate. In such election all the qualified voters of the entire school district proposed to be divided are entitled to vote. *Cummings v. Drake*, 164 Ga. 251, 138 S. E. 156.

Restoration in Spite of Ratification.—County board can divide a consolidated district and restore districts or parts as before, though consolidation was ratified at popular election. *Strickland v. Benton*, 166 Ga. 168, 171, 142 S. E. 671.

It was not error to refuse a mandamus requiring the county superintendent of schools to call an election for trustees in the consolidated district after it had been so divided by the board. *Strickland v. Benton*, 166 Ga. 168, 142 S. E. 671.

Effect of Consolidation.—Provision is made in this section for the addition of any part of one district to any other district. But when two districts are joined together, it is a consolidation of the districts; and where there is consolidation of two districts, the districts as they existed before cease. *Perry v. Baggett*, 164 Ga. 143, 146, 137 S. E. 766.

Prerequisites to Calling Election.—*Walker v. Hall*, 161 Ga. 460, 131 S. E. 160, approving and following *Shields v. Field*, 151 Ga. 465, 107 S. E. 44.

Interference by Equity to Enjoin Proceeding.—A court of equity will not enjoin a consolidation of districts by a county board which has held an election and declared the result to be in favor of the consolidation, because, even if the act can be construed to give the right to contest the election (there being no express provisions to that effect), it must be done before the result is declared. *Clark v. Board*, 162 Ga. 439, 134 S. E. 74.

§ 1551 (100). Transportation of pupils.—Whenever the county board of education or local district trustees deem it for the best interest of the school, they shall have the right to provide means for the transportation of the pupils and teachers to and from said school. Acts 1919, pp. 288, 327; 1927, p. 174.

Editor's Note.—The local district trustees were brought within the scope of this section by the amendment of 1927.

Discretion of County Board.—Under the provisions of this section the transportation of pupils and teachers to the public schools is a matter addressed entirely to the discretion of the several county boards of education of this State, having due regard to the facts and circumstances and the special needs and financial ability of the respective county boards of education. *Douglas v. Board of Education*, 164 Ga. 271, 138 S. E. 226.

§ 1551 (104). Term of loan.

Repayment from Local Tax.—A Board of Education having lawfully incurred debts for money loaned to pay teachers and operate the public schools of the county, and such debts having accumulated from year to year, it was in the power of that board to repay such debts from any funds that could lawfully be applied to such purpose, including funds derived from the levy of a local tax in the fall of the school year in which the debts are paid for operating the schools. *Board v. Thurmond*, 162 Ga. 58, 132 S. E. 427.

§ 1551(118). Free tuition, etc.

See § 6576.

ARTICLE 6.

Local Taxation for Schools.

§ 1551 (125).

Under previous rulings applied to the facts of the case, owners of land in a school district wherein was held an election resulting favorably to an issue of bonds for building a schoolhouse, which bonds were duly validated and sold, were not entitled to an injunction to prevent enforcement of executions to collect taxes duly levied for interest and sinking-fund of the bonds. *Brakefield v. Jarrell*, 168 Ga. 502, 148 S. E. 273.

Cited in *Parker v. Williams*, 168 Ga. 301, 147 S. E. 571.

§ 1551 (130). Power to collect taxes.

See notes to § 6579.

Where a local tax for educational purposes was imposed by the county authorities of the county of McIntosh upon the taxable property in the county, there being no independent local school systems in the county, at the rate of 5 mills, under the authority of section 1534 of the Civil Code of 1910, and at the rate of 5 mills under the authority of this section, thus aggregating 10 mills, the tax was, by 5 mills, in excess of that which the county authorities could legally impose. *McIntosh County v. Seaboard Air-Line Ry. Co.*, 38 Ga. App. 611, 144 S. E. 637.

Governed by Constitution.—Any local tax for educational purposes imposed by county authorities, outside of any independent local school systems in the county, is governed by the constitution section 6579 as amended, and shall not exceed in the aggregate 5 mills, as provided therein, whether the tax is imposed under any one or all of the following legislative enactments: Civil Code of 1910, section 513; section 1534, providing for the imposition of the tax when authorized by a popular vote, and this section shall determine. *Brown v. Martin*, 162 Ga. 173, 132 S. E. 896. See also, in this connection, *McMillan v. Tucker*, 154 Ga. 154(6), 113 S. E. 391; *Almand v. Board of Education*, 161 Ga. 911, 131 S. E. 879; *Central of Georgia Ry. Co. v. Wright*, 165 Ga. 1, 9, 10, 139 S. E. 890; *McIntosh County v. Seaboard Air-Line Ry. Co.*, 38 Ga. App. 611, 144 S. E. 637.

Restrictions upon Construction.—This statute, dealing with the subject of taxation, is to be interpreted in the light of the fundamental restriction upon taxation imposed by the constitution of this State, and will not be given a construction which violates such constitutional provision. *Penick v. Foster*, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346; *Almand v. Board*, 161 Ga. 911, 131 S. E. 897.

Levy of Tax upon City.—This statute does not authorize county authorities to levy a tax upon taxable property within an independent school district existing in a city, for the support of the public schools of the county under the control of the county board of education. *Almand v. Board*, 161 Ga. 911, 131 S. E. 897, overruling *Hanks v. D'Arcy*, 156 Ga. 55, 118 S. E. 656.

Applied in *Central of Ga. Ry. Co. v. Wright*, 165 Ga. 1, 139 S. E. 890.

§ 1551 (133). Election for school district.

Due process not denied by this section, as amended by Ga. L. 1921, p. 223. *Houston v. Thomas*, 168 Ga. 67, 74, 146 S. E. 908.

In General.—This section must be considered also in connection with section 141 of the Code of School Laws (Ga. L. 1919, pp. 288, 345; 8 Park's Code Supp. 1922, § 1438(y); *Michie's Code* 1926, § 1551(153), and § 61 of Civil Code. *Houston v. Thomas*, 168 Ga. 67, 69, 146 S. E. 908.

Place of Election.—In prescribing the place of election under this section the ordinary can designate a place other than a regular polling precinct established under section 79 of the Civil Code. *Freeman v. Callaway*, 165 Ga. 498, 141 S. E. 312.

Validity of Election When District Abolished and Substantially Recreated.—In *Dutton v. Rain*, 162 Ga. 189, 191, 132 S. E. 756, it was said: "On authority of *Stephens v. School District*, 154 Ga. 275(6), 277 (114 S. E. 197), we hold that the action of the county board of education in rescinding their former action creating the consolidated school district, and at the same meeting creating substantially the same district, can not be held by this court, as a matter of

law, to be a fraud, and that it did not render such election void." The court here has reference to an election for a school district tax, and was considering the following provision taken from § 1535, Civil Code of 1910. "An election for the same purpose shall not be held oftener than every twelve months." It will be noticed that this section contains the same provision. Ed. Note.

Substantial Compliance with Ballot Sufficient.—See § 126 and the note thereto.

* § 1551 (136). Election for additional levy tax.

Constitutionality.—This section is not violative of the constitution section, 6579. *Bacon v. Board of Public Education*, 165 Ga. 526, 141 S. E. 811.

Last Sentence Not Repealed.—The last sentence of this section was not repealed expressly or by necessary implication by section 1551(141). *Stapleton v. Martin*, 164 Ga. 336, 138 S. E. 767.

Effect of Failure to Specify Amount.—Where a call for an election under this section fails to specify the amount of the tax intended to be levied, the election is void, and consequently is no authority for the levy of the tax. *Stapleton v. Martin*, 164 Ga. 336, 138 S. E. 767.

Prior to the act of 1922 (Ga. L. 1922, p. 153), there was authority, under the act of 1919 (Ga. L. 1919, p. 288), for any school district to supplement the funds received from the State public-school funds, by levying a tax for educational purposes, upon an election being had for such purpose, not to exceed five mills on the dollar. This provision of law did not require, as does the subsequent act of 1922, that in the call for such election the additional tax proposed to be levied should be specified. See *Stapleton v. Martin*, 164 Ga. 336, 347 (6), 138 S. E. 767. The passage of the act of 1922 did not render invalid any election already held under the act of 1919. Accordingly, where an affidavit of illegality is filed to a tax-execution, issued on account of failure to pay such a local school tax, based upon the ground that the order calling the election did not specify the amount or rate of taxation to be authorized, and where in the record there is nothing that shows whether the election to determine whether the district should have local tax was held before or after the passage of the act of 1922, it will not be presumed that the levy was invalid because the order calling the election failed to specify the amount of the additional tax proposed to be levied, but, the burden of proof being upon the affiant attacking the execution, it will be assumed, nothing being shown to the contrary, that the election was legally had prior to the passage of the act of 1922 requiring such specification. *Seaboard Air-Line Ry. Co. v. Dorchester Consolidated School District*, 39 Ga. App. 185, 146 S. E. 510.

§ 1551 (141). Trustees and secretary; powers and duties.

Powers of Trustees—To Borrow Money.—The trustees of a local school district are not empowered or authorized by law to borrow money. Consequently, where such trustees borrowed \$2200 from a bank upon the draft of the secretary of said board of trustees upon the tax-collector, which was accepted by the latter, no liability attached to the local school district or to the trustees who succeeded the original borrowers. *Powell v. Bainbridge State Bank*, 161 Ga. 855, 132 S. E. 60.

See note to § 1551(136).

This section does not authorize trustees to charge matriculation fees for resident students attending any school receiving State aid; nor does the power conferred upon the county boards of education to define and regulate the public-school terms of the respective counties, under section 1551(89), and the fixing of such terms for shorter periods than the schools are actually operated, authorize such trustees to charge matriculation fees. *Brinson v. Jackson*, 168 Ga. 353, 148 S. E. 96.

§ 1551 (153). Elections, how governed.

See § 1551(133).

No person is lawfully entitled to vote in a school-district bond election held under this section, whose name does not appear on any list of the county registrars filed with the clerk of the superior court of the county, showing the names of the registered voters of the county entitled to vote. *Chapman v. Summer Consolidated School District*, 152 Ga. 450(2), 453, 109 S. E. 129; *Trustees of St. Clair School District v. Broxton*, 38 Ga. App. 65.

ARTICLE 6A.

Payment of Teachers.

§ 1551(154a). **Governor's authority to make debt to pay teachers.**—Pursuant to the amendment to Article 7, Section 3, Paragraph 1 of the Constitution of this State, authorizing the contraction by or on behalf of the State of a debt in an amount of \$3,500,000.00 for the purpose of paying the public-school teachers of the State, the Governor is hereby authorized and empowered to execute a note or notes for such amount and for such time of payment as the condition of the treasury may demand, at any time in his discretion, for the purpose of paying the public-school teachers of the State. The aggregate of said note or notes shall not at any time exceed the aforesaid constitutional limit, and said note or notes shall not mature later than February of the year succeeding the time of the execution thereof, and the principal amount so borrowed shall be repaid each year out of the common-school appropriation, and the interest thereon shall be paid each year out of the general funds of the State, accrued during the year of issue of said notes. Said notes shall be signed by the Governor and countersigned by the Comptroller-General and Secretary of State. Acts 1927, p. 168.

§ 1551(154b). **Authority to use funds allocated for other purposes.**—The Governor is further authorized and empowered, at any time in his discretion, to impress, use, and employ for the payment of public-school teachers of the State, and without payment of interest thereon, any funds in the Treasury which may have been allocated for any special fund or purpose, so as to obviate the necessity of increasing the public debt of the State and the payment of interest. Provided, however, that it shall be the duty of the Governor, when any fund shall be so used to replace said fund or funds by borrowing the same, if necessary, at such time as will not interfere with the expenditure for the purpose appropriated of any special or allocated fund or funds so drawn upon by the Governor by virtue of the authority granted in this Act.

§ 1551(154c). **Limit of authority.**—The Governor shall not during any calendar year impress, use, or employ any funds in the Treasury allocated or belonging to any special fund or purpose in excess of the borrowing power of the Governor under this Act.

ARTICLE 7.

Building School Houses in Local Tax Districts

§ 1551(155). **Election for bonds to build and equip school houses.**

What Amounts to Selection of Registered Voters.—Where the tax-collector took the list furnished to him by the trustees, went over it, and struck from it such names as he thought did not belong there, the voters entitled to registration were selected by him, and not by the trustees of the school district, the managers of the election, or the attorney for the trustees who copied the list at the request

of the collector. *Hawthorne v. Turkey Creek School Dist.*, 162 Ga. 462, 467, 134 S. E. 103.

When Sections 440 et seq. Followed.—This statute requires that the trustees "shall" follow the law as required of county authorities in section 440 et seq. in the issue of such bonds. *Veal v. Deepstep Consolidated School District*, 34 Ga. App. 67, 128 S. E. 223.

Notice of Election.—"As a condition precedent to the holding of an election for school bonds a notice of such election must be published for thirty days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published." *Burnam v. Rhine Consolidated School District*, 35 Ga. App. 110, 132 S. E. 137, following *Scott School Dist. v. Carter*, 28 Ga. App. 412, 111 S. E. 216.

Under § 6563 of the constitution of this State, a consolidated school district can not create a bonded debt "without the assent of two thirds of the qualified voters thereof voting at an election for that purpose, to be held as prescribed by law;" and such two thirds must constitute "a majority of the registered voters." *Buchanan v. Woodland Consolidated School District*, 168 Ga. 626, 148 S. E. 663.

Applied in *Fairburn School District v. McLarin*, 166 Ga. 867, 144 S. E. 765.

§ 1551 (157). **Bond election; tax to provide sinking fund for retirement of bonds.**

Constitutionality.—The last sentence of the last paragraph of this section makes the section conform to Art. 7, § 7, par. 2 of the Constitution. *Seaboard Air-Line Ry. Co. v. Wright*, 165 Ga. 367, 140 S. E. 863.

The levy of a tax of twelve mills on the dollar, if that amount of tax is necessary to provide a sinking fund for the retirement of bonds issued to build a schoolhouse in a local school district, and to pay the interest thereon, is not violative of the provisions of article 8, section 4, paragraph 1, of the constitution, for the reason that that paragraph of the constitution deals only with the support of public schools, and has no reference to the erection of school buildings or the payment of the debts created by the erection of school buildings. *Seaboard Air-Line Ry. Co. v. Wright*, 165 Ga. 367, 140 S. E. 863.

Where Record Does Not Show Tax Excessive.—In the case sub judice the county authorities, in addition to the tax of five mills for the support of the school, levied twelve mills for the retirement of schoolhouse bonds. Inasmuch as it does not appear from the record that the levy of twelve mills is excessive for the reason that the amount of tax levied is unnecessary to retire the bonds and for paying the interest thereon, the trial judge did not err in refusing to enjoin the process of the levy, and in dismissing the illegality. *Seaboard Air-Line Railway Co. v. Wright*, 165 Ga. 367, 140 S. E. 863.

ARTICLE 9A

Instruction in Animal, Bird and Fish Life

§ 1551(184a). **Training for conservation of useful wild life.**—For the purposes of lessening crime and raising the standard of good citizenship and inculcating in the minds of the children of this State a spirit of thrift, economy, and kindness therefor, by including in the curriculum of all public schools in the State of Georgia a course of training to teach, promote, and encourage the conservation and protection of birds, animals, fish, forest, and any and all other forms of useful wild life. Acts 1929, p. 188, § 1.

§ 1551(184b). **Periods of instruction.**—In every public school of this State a period of not less than twenty-five minutes of each week during the entire school term shall be devoted to teaching the pupils thereof the practical value of conserving and protecting birds, animals, fish, forest, and other forms of wild life; also the humane

treatment and protection of our domestic birds and animals, as well as the part they fulfill in the economy of nature. It may be optional with the teacher whether this period shall be a consecutive twenty-five minutes or be divided into shorter periods during the week; and it shall also be within the discretion of the teacher as to the method of instruction to be employed. The instruction herein prescribed shall constitute a definite purpose of the curriculum of study in all the public schools of this State. Acts 1929, p. 188, § 2.

§ 1551(184c). **Reports of teachers.**—Each and every teacher in the schools of this State shall certify in his or her reports that the instruction provided for has been in accordance with the provisions of this article. Acts 1929, p. 189, § 3.

ARTICLE 10B

Compulsory School Attendance

§ 1551 (195). Attendance officer.

As to order of the attendance officer denying admission to school of children not vaccinated, see *Sherman v. Board of Education*, 165 Ga. 889, 142 S. E. 152.

TWELFTH TITLE

Police and Sanitary Regulations

CHAPTER 1

Georgia State Sanitarium

ARTICLE 1

The Trustees

§ 1571. Managed by ten trustees.

Editor's Note.—Acts 1929, p. 324, changed the name of the Georgia State Sanitarium to Milledgeville State Hospital.

CHAPTER 7.

County Sanitary Regulations, Boards of Health, Sanitary Districts, Cemeteries, Hospitals, etc., Contracts for Sanitation.

§§ 1676(1)-1676(24). Park's Code.

See §§ 1681(27)-1681(46).

§ 1676(14). Cemeteries, hospitals, etc., outside municipalities.

Necessity of Assignment to Users of Permit. — Where a proposed corporation on being organized after the issuance

of a permit to a private person, acquired the property named for the purpose, it was not essential to its use and enjoyment of the permission to establish such cemetery that the person by whom such permission was obtained should make an assignment of the same to the corporation. *Fairview Cemetery Co. v. Wood*, 36 Ga. App. 709, 138 S. E. 88.

Revocation after Expenditures Made.—Where the person to whom the permission was granted or one succeeding thereto had, on the faith thereof, expended large sums of money in the expectation of using and enjoying the permission so granted, a resolution thereafter adopted by the county authorities, for the purpose of rescinding their previous action in making the grant, was void and of no effect, where its adoption was without a hearing and without any sort of notice to the person to be adversely affected, where also there was nothing to show any of the conditions of such permission had been violated. *Fairview Cemetery Co. v. Wood*, 36 Ga. App. 709, 138 S. E. 88.

§§ 1676(25), 1676(26). Park's Code.

See P. C. §§ 503(10)-503(11).

§§ 1676(mm-1)-1676(mm-17). Park's Code.

See §§ 2177(1)-2177(20).

§ 1676(nn). Park's Code.

See § 1676(14).

CHAPTER 8A.

Registration of Births and Deaths.

§§ 1681(1) to 1681(26). Superseded by the Acts of 1927 p. 353, herein codified as §§ 1681(27) et seq.

§ 1681 (27). **Registration of births and deaths.**—The State board of health shall have charge of the registration of births and deaths in this State; shall prepare the necessary instructions, forms, and blanks for obtaining and preserving such records, and shall procure the faithful registration of same in each primary registration district as constituted in section 1681(29), and in the central bureau of vital statistics at the Capitol of the State. The said board shall be charged with the uniform and thorough enforcement of this law throughout the State, and shall from time to time recommend any additional legislation that may be necessary for this purpose. Acts 1927, p. 354.

The proper person to issue a burial permit is the registrar of the city or militia district, as the case may be, in which the person died or the body was found. *Fairview Cemetery Co. v. Wood*, 36 Ga. App. 709, 719, 138 S. E. 88.

§ 1681 (28). **Bureau of vital statistics; State registrar; appointment, qualifications.**—The secretary of the State Board of Health shall have general supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board, and which shall be under the immediate direction of the State Registrar of Vital Statistics, whom the State Board of Health shall appoint, and who shall be a medical practitioner of not less than five years practice in his profession, and a competent vital statistician. The term of office of the State Registrar of Vital Statistics shall be four years, and he shall continue in office until his successor has qualified. A successor shall be appointed for the ensuing term

at least ten days before the expiration of each term. Any vacancy occurring in such office during a term shall be filled by appointment for the unexpired part of the term. The State Board of Health shall provide for such clerical and other assistant as may be necessary for the purposes of this Act, who shall serve during the pleasure of the board. The compensation of the State Registrar of Vital Statistics and the compensation of said assistants shall be paid by the said board out of the funds appropriated by the General Assembly for the maintenance of the State Board of Health. The custodian of the capitol shall provide for the Bureau of Vital Statistics, at the State Capitol, suitable offices, which shall be properly equipped with fireproof vaults and filing cases for the permanent and safe preservation of all official records provided for by this Act.

§ 1681 (29) Districts for registration.—For the purpose of this Act the State shall be divided into registration districts as follows: Each city, each incorporated town, and each militia district or part thereof outside of a city or incorporated town shall constitute a primary registration district. The State Board of Health may combine two or more primary registration districts as one district, or may establish additional districts by dividing a primary registration district into two or more districts, when necessary to facilitate registration.

§ 1681 (30). Local registrars.—In each city of this State the city clerk, and in each incorporated town the town clerk, and in each militia district or part thereof outside of a city or of an incorporated town the justice of the peace therefor, or, if there be no justice of the peace, the notary public and ex-officio justice of the peace thereof, shall be the local registrar of vital statistics, except where another person has been appointed as such registrar by the State board of Health, the said board being hereby authorized to appoint the local registrars in any and all registration districts, in their discretion. Each local registrar shall appoint a deputy registrar, who shall serve as registrar when the local registrar, is not immediately accessible for the purpose of registration or the issuance of certificates or permits as required by this Act; and should the local registrar and his deputy both be absent from their registration district, the duties of the local registrar of that district may be performed by the local registrar of any adjoining district in the same county; and in such cases the registrar acting in the absence of the local registrar shall note on each certificate issued by him the date of filing, and shall forward the certificate in ten days, and in all cases before the third day of the following month, to the local registrar in whose place he has acted. Any local registrar or deputy registrar who, in the judgment of the State Board of Health, fails to make a proper and complete return of births and deaths, or to discharge any of his other duties as prescribed by this Act, may be summarily removed by said board, and he shall be subject to such penalties as are provided for such officers under section 503(10) Penal Code.

§ 1681 (31). Burial or removal permit.—The body of any person whose death occurs in this State, or which shall be found dead therein, shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of or removed from or into any registration district, or be temporarily held pending further disposition more than seventy-two hours after death, unless a permit for burial, removal, or other disposition thereof shall have been properly issued by the local registrar of the registration district in which the death occurred or the body was found. And no such burial or removal permit shall be issued by the registrar until, where practicable, a complete and satisfactory certificate of death has been filed with him as hereinafter provided; provided, that when a dead body is transported from outside of the state into this State or from one registration district into another registration district within this State, for burial, the transit or removal permit issued in accordance with the law and health regulations of the place where the death occurred shall be accepted by the sexton or person in charge of the cemetery in lieu of a burial permit at the place of burial.

§ 1681 (32). Stillborn child to be registered twice.—A stillborn child shall be registered as a birth and also a death, and separate certificates of both the birth and the death shall be filed with the local registrar, in the usual form and manner, the certificate to contain, in the place of the name of the child, the word "stillbirth," provided that a certificate of birth and a certificate of death shall not be required for a child that has not advanced to the fifth month of uterogestation. The medical certificate of the cause of death shall be signed by the attending physician, if any, and shall state the cause of death as "stillborn," with the cause of stillbirth, if known, whether a premature birth, and if born prematurely, the period of uterogestation, in months, if known; and the burial or removal permit of the prescribed form shall be required. Midwives shall not sign certificates of death for stillborn children; but such cases, and stillbirths occurring without attendance of either physician or mid-wife, shall be treated as deaths without medical attendance, as provided for in section 1681(34).

§ 1681 (33). Death certificate; contents.—The certificate of death shall contain the following items, and such other items as are deemed necessary for legal, social, and sanitary purposes subserved by registration records: (1) Place of death, including State, county, incorporated town, village, or city. If in a city, the ward, street, and house number: if in a hospital or other institution, the name of the same to be given instead of the street and house number. If in an industrial camp, the name of the camp to be given. (2) Full name of decedent. If an unnamed child, the surname preceded by "Unnamed." (3) Sex. (4) Color or race; as white, black, mulatto (or other Negro descent), Indian, Chinese, Japanese, or other. (5) Conjugal relation; as single, married, widowed, or divorced. (6) Date of birth, including year, month, and day. (7) Age, in years, months, and days. If less than one day, the

hours or minutes. (8) Occupation. The occupation to be reported of any person male or female, who had any remunerative employment, with the statement of (a) trade, profession, or particular kind of work; (b) general nature of industry, business, or establishment in which employed (or employer). (9) Birthplace, at least State or foreign country, if known. (10) Name of father. (11) Birthplace of father, at least State or foreign country, if known. (12) Maiden name of mother. (13) Birthplace of mother, at least State or foreign country, if known. (14) Signature and address of informant. (15) Official signature of registrar, with the date when the certificate was filed and registered number. (16) Date of death, year, month, and day. (17) Certification as to medical attendance on decedent, fact and time of death, time last seen alive, and cause of death, with contributory (secondary) cause of complication, if any, and duration of each, and whether attributed to dangerous or insanitary conditions or employment; signature and address of physician or official making the medical certificate. (18) Length of residence (for inmates of hospitals or other institutions, transients or recent residents) at place of death and in the State, together with the place where the disease was contracted, if not at place of death, and former or usual residence. (19) Place of burial or removal, date of burial. (20) Signature of undertaker or person acting as such, and post-office address. The personal and statistical particulars (items 1 to 13) shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts. The statement of facts relating to the disposition of the body shall be signed by the undertaker or the person acting as such. The medical certificate shall be made and signed by the physician, if there was any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which the death occurred. And he shall further state the cause of the death, so as to show the course of the disease or sequence of causes resulting in the death, giving first the name of the disease causing death (primary cause) and the contributory (secondary) cause, if any, and the duration of each. Indefinite and unsatisfactory terms, denoting only symptoms of disease or conditions resulting from disease, will not be held sufficient for the issuance of a burial or removal permit, and any certificate containing only such terms, as defined by the State Registrar, shall be returned to the physician or person making the medical certificate, for correction and more definite statement. Causes of deaths which may be the result of either disease or violence shall be carefully defined; and if violence, the means of injury shall be stated, and whether (probably) accidental, suicidal, homicidal. And for the deaths in hospitals or institutions, or of non-residents, the physician shall supply the information required, under this head (item 18), if he is able to do so, and may state where, in his opinion, the disease was contracted.

§ 1681(34). Death without medical attention.—

In case of any death occurring without medical attention, it shall be the duty of the undertaker to notify the local registrar of the death, and

when so notified the registrar shall, prior to the issuance of the permit, inform the local health officer, if there be such officer in the district where the death occurred, and refer the case to him for immediate investigation and certification; provided, that when the local health officer is not a physician, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other person having adequate knowledge of the facts; provided, further, that if the registrar has reason to believe that the death may have been due to unlawful act or neglect, he shall then refer the case to the coroner or other proper official for his investigation and certification. And the coroner or other proper official whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing the death, or, if from external causes, (1) the means of death, and (2) whether (probably) accidental, suicidal, or homicidal, and shall in any case furnish such information as may be required by the State Registrar in order to classify the death properly.

§ 1681(35). Procedure, in obtaining burial permit.—The undertaker, or the person acting as undertaker, shall file the certificate of death with the local registrar of the district in which the death occurred, and obtain a burial or removal permit prior to any disposition of the body. He shall obtain the required personal and statistical particulars from the person best qualified to supply them, over the signature and address of his informant. He shall then present the certificate to the attending physician, if there was any, or to the health officer, or coroner, as directed by the local registrar, for the medical certificate of the cause of death and other particulars necessary to complete the record as specified in sections 1681-(33), 1681(34) and he shall then state the facts required relative to the date and place of burial or removal, over his signature and with his address, and present the complete certificate to the local registrar in order to obtain a permit for burial, removal, or other disposition of the body. The undertaker shall deliver the burial or removal permit to the person in charge of the place of burial, before interring or otherwise disposing of the body, or shall attach the transit permit to the box containing the corpse when shipped by any transportation company; said permit to accompany the corpse to its destination where, if within the State of Georgia, it shall be delivered to the person in charge of the place of burial. Every person, firm, or corporation selling a coffin or burial casket shall keep a record showing the name of the purchaser, and the purchaser's post-office address, and the name of the deceased, which record shall be open to inspection of the State Registrar at all times. On the first day of each month the person, firm, or corporation selling coffins or burial caskets in this State shall report to the State Registrar each sale for the preceding month, on a blank provided for that purpose; provided, however, that no person, firm, or corporation selling coffins or burial caskets to dealers or undertakers only shall be required to keep such record, nor shall such report be required from the undertakers when they have direct

charge of the disposition of the dead body. Every person, firm, or corporation selling coffins or burial caskets at retail, and not having charge of the body, shall inclose within the casket or coffin a notice furnished by the State registrar, calling attention to the requirements of the law, a blank certificate of death, and the rules and regulations of the State Board of Health concerning the burial or other disposition of a dead body.

§ 1681(36). Contents of burial permit.—If the interment or other disposition of the body is to be made within the State, the wording of the burial or removal permit may be limited to a statement by the registrar, and over his signature, that, a satisfactory certificate of death having been filed with him as required by law, permission is granted to inter, remove, or dispose otherwise of the body, stating the name, age, sex, cause of death, and other necessary details upon the form prescribed by the State Registrar.

§ 1681(37). Burial without permit prohibited; indorsement and return of permit.—No person in charge of any premises on which interments are made shall inter or permit the interment or other disposition of any body unless it is accompanied by a burial, removal, or transit permit as herein provided, and every such person shall indorse upon the permit the date of the interment, over his signature, and shall return all permits so indorsed to the local registrar of his district within ten days from the date of interment, or within the time fixed by the local board of health. He shall keep a record of all bodies interred or otherwise disposed of on the premises under his charge, in each case stating the name of each deceased person, place of death, date of burial or disposal, and name and address of the undertaker, which record shall at all times be open to official inspection; provided, that the undertaker or person acting as such, when burying a body in a cemetery or burial ground having no person in charge, shall sign the burial or removal or transit permit giving the date of burial, and shall write across the face of the permit the words "No person in charge," and file the burial or removal or transit permit within ten days with the registrar of the district in which the cemetery is located.

§ 1681(38). Birth registration.—The birth of each and every child born in this State shall be registered as hereinafter provided.

§ 1681(39). Certificate of birth to be filed.—Within ten days after the date of each birth, there shall be filed with the local registrar of the district in which the birth occurred a certificate of such birth, which certificate shall be upon the form adopted by the State Registrar, upon advice and consent of the State Board of Health, with a view of procuring a full and accurate report with respect to each item of information enumerated in section 1681(40). In each case where a physician, or midwife, or person acting as a midwife was in attendance upon the birth, it shall be the duty of such person to file in accordance herewith the certificate herein contemplated. In each case where there was no physician, or midwife,

or person acting as midwife, in attendance upon the birth, it shall be the duty of the father or mother of the child, or the householder or the owner of the premises where the birth occurred, having knowledge of such birth, or the manager or superintendent of the public or private institution where the birth occurred, each in the order named, within ten days after the date of such birth, to report to the local registrar the fact of such birth. In such case, and in case the physician, or midwife, or person acting as midwife, in attendance upon the birth, is unable, by diligent inquiry, to obtain any item or items of information contemplated in section 1681(40), it shall be the duty of the local registrar to secure from the person so reporting, or from any other person having the required knowledge, such information as will enable him to prepare the certificate of birth herein contemplated, and it shall be the duty of the person reporting the birth, or who may be interrogated in relation thereto, to answer correctly and to the best of his knowledge all questions put to him by the local registrar which may be calculated to elicit any information needed to make a complete record of the birth as contemplated by section 1681(40) and it shall be the duty of the informant, in any statement made in accordance herewith, to verify such statement by his signature, when requested so to do by the local registrar.

§ 1681(40). Contents of birth certificate.—The certificate of birth shall contain the following items, and such other items as are deemed necessary for the legal, social, and sanitary purposes subserved by registration records: (1) Place of birth, including State, county, incorporated town, village, or city; if in a city, the ward, street, and house number; if in a hospital or other institution, the name of the same to be given instead of the street and house number. (2) Full name of child. If the child dies without a name, before the certificate is filed, enter the words "died unnamed." If the living child has not yet been named at the date of filing certificate of birth, the space for full name of child is to be left blank, to be filled out subsequently by a supplemental report, as hereinafter provided. (3) Sex of child. (4) Whether a twin, triplet, or other plural birth. A separate certificate shall be required for each child in case of plural births. (5) For plural births, number of each child in order of birth. (6) Whether legitimate or illegitimate. (7) Date of birth, including year, month, and day. (8) Full name of father; provided that if the child is illegitimate, the name of the putative father shall not be entered without his consent, but the other particulars relating to the putative father (items 9 to 13) may be entered if known, otherwise as "unknown." (9) Residence of father. (10) Color or race of father. (11) Age of father at last birthday, in years. (12) Birthplace of father, at least State or foreign country if known. (13) Occupation of father, occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work: (b) general nature of industry, business, or establishment in which employed (or employer). (14) Maiden name of mother. (15) Residence of mother. (16) Color or race of

mother. (17) Age of mother at last birthday, in years. (18) Birthplace of mother, at least State or foreign country, if known. (19) Occupation of mother. The occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work, (b) General nature of industry, business, or establishment in which employed (or employer). (20) Number of children born to this mother, including present birth. (21) Number of children of this mother, living. (22) The certification of the attending physician or midwife as to the attendance at birth, including statement of year, month, day (as given in item 7), and hour of birth, and whether child was born alive or still-born. This certification shall be signed by the attending physician or midwife, with the date of signature and address; if there is no physician or midwife in attendance, then by the father or mother of the child, householder, owner of the premises, or manager or superintendent of public or private institution where the birth occurred, or other competent person, whose duty it shall be to notify the local registrar of such birth, as required by section 1681(39). (23) Exact date of filing in office of local registrar, attested by his official signature, and registered number of birth, as hereinafter provided.

§ 1681(41). Supplemental report.—When any certificate of birth of a living child is presented without the statement of the given name, then the local registrar shall make out and deliver to the parents of the child a special blank for the supplemental report of the given name of the child, which shall be filled out as directed, and returned to the local registrar as soon as the child shall have been named.

§ 1681(42). Registration of midwives.—Every midwife shall register his or her name, address, and occupation with the local registrar of the district in which he or she resides, or may hereafter establish a residence, such registration to be made on or before the first day of February in each year, or, if such residence is established after that date, then within thirty days after the same is established; and shall thereupon be supplied by the local registrar with a copy of this Act, together with such rules and regulations as may be prepared by the State registrar relative to its enforcement. Within sixty days after the close of each calendar year each local registrar shall make a return to the State Registrar of all midwives who have registered in his district. No fee or other compensation shall be charged by local registrars to midwives for registering their names under this section or making returns thereof to the State Registrar.

§ 1681(43). Blanks supplied by State registrar.—The State Registrar shall prepare, print, and supply all registrars all blanks and forms used in registering, recording, and preserving the returns, or in otherwise carrying out the purposes of this Act, and shall prepare and issue such detailed instructions as may be required to procure the uniform observance of its provisions and the maintenance of a perfect system of reg-

istration; and no other blanks shall be used than those supplied by the State Registrar, except that in the transportation of dead bodies the standard form of permit adopted by the State Board of Embalmers may be used. He shall carefully examine the certificates received monthly from the local registrars; and if any such are incomplete or unsatisfactory, he shall require such further information to be supplied as may be necessary to make the records complete and satisfactory. And all physicians, midwives, informants, or undertakers, and all other persons having knowledge of the facts, are hereby required to supply, upon a form provided by the State Registrar or upon the original certificate, such information as they may possess regarding any birth or death, upon demand of the State registrar, in person, by mail, or through the local registrar. No certificate of birth or death, after its acceptance for registration by the local registrar, and no record made in pursuance of this Act shall be altered or changed in any respect otherwise than by amendments properly dated, signed and witnessed. The State Registrar shall further arrange, bind, and permanently preserve the certificates in a systematic manner, and shall prepare and maintain a comprehensive index of all births and deaths registered, said index to be arranged alphabetically, in case of deaths, by name of decedents, and in case of births, by the names of the fathers, or the mothers in the event the name of the father is not known. He shall inform all registrars what diseases are to be considered infectious, or communicable, and dangerous to the public health, as decided by the State Board of Health, in order that when deaths occur from such diseases proper precautions may be taken to prevent their spread. If any cemetery company or association, any church or historical society or association, or any other company, society, or association, or any individual is in possession of any record of births and deaths which may be of value in establishing the genealogy of any resident of this State, such company, society, association, or individual may file such record, or a duly authenticated transcript thereof, with the State registrar, and it shall be the duty of the State Registrar to preserve such record or transcript, and to make a record and index thereof in such forms as to facilitate the finding of any information contained therein. Such record and index shall be open to inspection by the public, subject to such reasonable conditions as the State Registrar may prescribe. If any person desires a transcript of any record filed in accordance herewith, the State Registrar shall furnish the same upon application, together with a certificate that it is a true copy of such record as filed in his office.

§ 1681(44). Local registrar's duties; unsatisfactory certificate of death.—Each local registrar shall supply blank forms of certificates to such persons as require them. Each local registrar shall carefully examine each certificate of birth or death when presented for record, in order to ascertain whether or not it has been made out in accordance with the provisions of this Act and the instructions of the State Registrar. And if any certificate of death is incomplete or unsatisfactory, it shall be his duty to call attention to

the defects in the returns, and to withhold the burial or removal permit until such defects are corrected. All certificates either of birth or death shall be written legibly in durable black ink, and no certificate shall be held to be complete and correct that does not supply all the items of information called for therein, or satisfactorily account for their omission. If the certificate of death is properly executed and complete, he shall then issue a burial or removal or transit permit to the undertaker; provided, that in case the death occurred from some disease which is held by the State Board of Health to be infectious, contagious, or communicable or dangerous to the public health, no permit for the removal or other disposition of the body shall be issued by the registrar, except under such conditions as may be prescribed by the State Board of Health. If a certificate of birth is incomplete, the local registrar shall immediately notify the informant, and require him to supply the missing items of information if they can be obtained. He shall number consecutively the certificates of birth and death, in two separate series, beginning with number one for the first birth, and the first death of each calendar year, and sign his name as registrar in attest of the date of filing in his office. He shall also make a complete and accurate copy of each birth and each death certificate on the form provided by the State registrar for that purpose, and he shall, on or before the tenth day of each month, transmit to the State Registrar all original certificates registered by him for the preceding month, and shall forward to the ordinary of the county in which his district is located his copy of the same, or, if there be a full-time city health officer or a full-time county health officer located in his county, he shall forward his copy to said health officer instead of to the ordinary. And if no birth or no death occurs in any month, he shall on the tenth day of the following month report that fact to the State Registrar on a card provided for that purpose. And all birth and death certificates filed with a local registrar when the birth or death occurred outside his district must be forwarded by him, within ten days, to the local registrar of the district in which the birth or death occurred. The ordinary or health officer, as the case may be, shall file and preserve in his office all copies of certificates received by him.

§ 1681(45). Fees.—Each local registrar shall be paid a fee of fifty cents for each birth certificate and for each death certificate properly made out and registered with him, and correctly recorded and promptly returned by him to the State Registrar as required by this Act. And in case no birth or no death certificate was registered during a month, the local registrar shall be paid a fee of twenty-five cents for each report made by him to that effect, if such report be made promptly as required by this Act. All amounts payable to a local registrar under the provisions of this section shall be paid from county funds by the treasurer of the county in which the registration district is located, and the State Registrar shall annually, or, in the discretion of the State Board of Health, from time to time during the year, certify to the treasurers of the several counties the number of births and deaths

properly registered, with the names of the local registrars and the amounts due each at date of said certificate; provided that before such fees are paid by the county treasurer, the State Registrar's certificate as to the amount due for such fees shall be verified by a certificate of the ordinary of the county, or city or county health officer, as the case may be, to whom copies of the original certificates have been furnished by the local registrar as provided in section 1681(44). The ordinary or the county or city health officer, as the case may be, shall be paid a fee of ten cents for each copy of birth and each copy of death certificate properly filed by him under section 1681(44), said fee to be paid from county funds by the county treasurer.

§ 1681(46). Certified copies.—The State registrar or ordinary or the county or city health officer shall, upon request, supply to any applicant, a certified copy of the record of any birth or death registered under the provisions of this Act, and any such copy of the record of a birth or death, when properly certified by the State registrar or ordinary or city or county health officer, as the case may be, shall be prima facie evidence in all courts and places of the facts therein stated, for which said applicant shall pay a fee of fifty cents. The United States Census Bureau may obtain, without expense to the State, transcripts or certified copies of births and deaths.

CHAPTER 9

Practice of Medicine; How Regulated.

ARTICLE 1

Practitioners

§ 1684. (§ 1479). Practitioners must register.

Section Repealed.—See notes to § 1697(6).

ARTICLE 2

State Board of Medical Examiners

§ 1697(e). Park's Code.

See § 1697(5).

§ 1697(5). License required before practice; how obtained.

Constitutionality.—The right to practice medicine is, like the right to practice any other profession, a valuable right, which is entitled to be protected under the constitution and laws of the State. But the State in the exercise of the inherent police power of the sovereign may place such restrictions on a licensee as may be necessary for the welfare and safety of society. A statute which regulates the right to practice medicine, but leaves the field open to all who possess the prescribed qualifications, does not abridge the privilege or immunities of citizens. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

This law is not unjustly discriminatory so as to render it void. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

A license to practice medicine is not a contract, and gives the licensee no right to continue in the practice in the future unrestricted, and such license may be revoked for good cause, and such revocation alone is not a taking of property without due process of law. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

§ 1697(f). Park's Code.

See § 1697(6).

§ 1697(6). Recording of certificate; fee; report.

Editor's Note.—Section 3 of the act of 1881, embodied in section 1684 of the Code, was repealed by implication by the act of December 12, 1894 (Ga. L. 1894, p. 85). The act of 1894 was in turn repealed, either expressly or by implication, by the act of 1913 (now this section), and after August 18, 1913, a physician licensed under the act of 1894 was not required to register in accordance with the provisions of the act of 1881, and a physician licensed under the act of 1894, who had caused his certificate to be recorded as required by that act, could recover for services rendered after August 18, 1913, although the record of his certificate had been made prior to August 18, 1913. *Friedman v. Mizell*, 164 Ga. 1, 137 S. E. 400; *Friedman v. Mizell*, 36 Ga. App. 615, 137 S. E. 854.

§ 1697(m). Park's Code.

See § 1697(13).

§ 1697(13). Refusal and revocation of licenses.

Editor's Note—Constitutionality.—This section is not violative of the constitution, section 6545, which provides that "The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate," etc. *Lewis v. State Board*, 162 Ga. 263, 133 S. E. 469.

Nor is it violative of the due-process clauses of the State and Federal constitutions. The section provides for notice of the time and place of hearing, for service of the notice, for the production of the defendant's evidence, and for making his defense, and also for an appeal from the State Board of Medical Examiners to a jury in the superior court; and this provides due process of law. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

The language of this section which declares that a licensee's name may be removed from the records in the office of any clerk of court in this State, and his license revoked upon the ground of "conviction of crime involving moral turpitude," is not so vague, uncertain, and indefinite as to render the same void. The words "moral turpitude" are capable of accurate definition. The legislature may enact that one who has been convicted of crime "involving moral turpitude" shall no longer practice medicine. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

Nor is the provision that "said appeal to be had as in other cases now provided by law," void for uncertainty. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

Retroactive Effect.—This section is not retroactive as applied to the facts of the case at bar. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

Prohibiting Advertisements.—Under the police power of the State the legislature may prohibit advertisements by licensed physicians with reference to "any disease of the sexual organs;" and provide for a revocation of the license of such practicing physician upon a majority vote of the State Board of Medical Examiners, for a violation of the above provision of the act. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

Notice—Specifying Law Alleged to Be Violated.—In preferring charges against a practicing physician in order to revoke his license under the act of 1913, as amended by the act of 1918, it is not necessary to specify the law under which the charges are preferred. *Hughes v. State Board*, 162 Ga. 246, 134 S. E. 42.

CHAPTER 10

Professional Nursing

ARTICLE 1

Board of Examiners

§§ 1698 to 1711(1).—Repealed by the Acts of 1927, p. 247, herein codified as §§ 1711(7) et seq.

ARTICLE 3

Profession Regulated

§§ 1711(2)-1711(20). Park's Code.

See §§ 1711(7)-1711(22).

§ 1711(7). Board of Examiners of nurses created; members.—The Board of Examiners of Nurses for Georgia is hereby created. It shall be composed of five persons to be elected and appointed in the following manner: The Georgia State Nurses' Association will, within thirty (30) days after this Act takes effect, nominate to the Governor of this State ten (10) of its members, none of whom is in any way connected with any training-school for nurses. The said nurses must have had at least three (3) years of practice in their profession immediately preceding their appointment. From this number the Governor shall, within thirty (30) days thereafter, appoint for places on the said board one nurse who shall hold office for one (1) year from date of appointment; and two (2) shall hold office for two (2) years from said date, and two (2) shall hold office for three (3) years from said date. All of the said appointments shall have the same date; provided no two of the nurses so appointed shall have graduated from the same training-school. Upon the expiration of the term of office of any member of said board the Governor of this State shall appoint a successor to fill the said term of office, who shall hold office for three (3) years from the date of the expiration of, the said term of office. The said appointment shall be made from a list of five (5) members of the said association, to be furnished to him by the said association. All vacancies occurring on this board shall be filled by the Governor for the unexpired term from like nominations furnished to him by the said association within thirty (30) days after the vacancy occurs; provided, that if the said association fails to make the nominations herein required within the time here specified, the Governor shall make such appointments by nominating such members of the nursing profession hereto as may seem to him to be proper. Acts 1927, p. 247.

§ 1711(8). Officers.—The members of this State Board of Examiners shall, within thirty (30) days after appointment, organize by the election of one of its members to be the president of the said board, and another to be the secretary and treasurer, who shall hold office for a period of one year and until their respective successors are elected and have qualified; said officers shall be elected by the board annually, and in case of a vacancy in either of said offices the board shall, within forty (40) days after the vacancy occurs, elect one of its number to fill the said office; and in the event there is no such election within the time named, the Governor shall appoint a member of said board to fill the vacancy. The secretary is required to certify to the Governor the names of the officers so elected; and in the case of a vacancy, this shall likewise be certified by the secretary to him; and in the event of a vacancy in the office of the secretary, the president of the board shall certify the same to him, and shall certify the name of the person chosen to fill the

vacancy in the event the vacancy is filled by the board.

§ 1711(9). Quorum; records; seal; certificates.—Three (3) members of said Board of Examiners shall constitute a quorum, but no action of said board shall be valid unless authorized by the affirmative vote of three (3) members thereof. The secretary of the board is directed to keep a record of the minutes of the meetings of said board, and a record of the names of all persons applying for registration hereunder, and of the action of the board thereon, and a register of all nurses who have complied with the requirements of this Act, all of which said records shall, at all reasonable times, be open to public inspection. Said board is authorized to have and use an official seal which shall bear the words: "State Board of Examiners of Nurses for Georgia." The certificate of the secretary of said board under the seal thereof as to the action or non-action of the board shall be accepted in evidence in the courts of this State as the best evidence of the minutes of the said board; and likewise the certificate of the secretary under the said seal, as to the registration or non-registration of any person, shall be accepted as the best evidence as to the registration or non-registration of the said person under the requirements of this Act. The secretary shall issue to all nurses admitted to registration hereunder a certificate under the seal of the said board, showing that fact.

§ 1711(10). Examinations; Notice.—It shall be the duty of said board to meet for the purpose of examining applicants for registration, at least once in each year, and oftener should it be deemed necessary by said board. Notice of said meetings shall be given of the time and place of said meetings by written notice posted, postage prepaid, to the last known address of each applicant, at least ten (10) days before the time of said meeting, and by publication in a daily paper of general circulation in Atlanta, and in a nurses' journal, if there be one published in Georgia. The said notice shall be published at the same rates charged for sheriffs' advertisements. Said notice shall be inserted at least once, and the first insertion shall be made at least two weeks prior to said meeting. Provided, the secretary of said board shall issue a temporary permit to each application for registration, which permit will authorize said applicant to do nursing as a registered nurse until the next meeting of the board.

§ 1711(11). Deposit fee by applicant; dental nurses.—All graduate nurses making application for registration as graduate nurses under this Act shall deposit with the Secretary of the said board, at the time of making such application, the sum of ten (\$10.00) dollars as an examination or registration fee. Provided, that no person shall engage in practice as a dental hygienist or dental nurse without first obtaining a certificate therefor to be issued by the Board of Dental Examiners of Georgia, which certificate shall be issued by said Board of Dental Examiners upon written examination conducted by and satisfactory to said board, which shall include the subjects of Dental

Anatomy, Physiology, Bacteriology, Dental Pathology, Sterilization, Office Routine, and Oral Hygiene and Prophylaxis. Provided further, that applicants for certificates as dental hygienists or dental nurses shall be of good moral character, shall be at least 19 years of age, shall have had such preliminary education and training as may be prescribed by said Board of Dental Examiners, and shall pay to said Board of Dental Examiners a fee of ten dollars for such examination. Provided further, that no person to whom such certificate is issued shall engage in practice as a dental hygienist or dental nurse except under the supervision of a licensed dentist, and no such person shall practice dentistry, or do any kind of dental work other than to remove calcareous deposits, secretions, and stains from the normally exposed surfaces of the teeth, and to apply ordinary wash or washes of a soothing character, and to do sterilization and office routine.

§ 1711(12). Qualifications.—Each applicant for registration as a graduate nurse must be at least twenty-one (21) years of age, of good moral character, a graduate of a regular chartered training-school for nurses, connected with a general hospital or sanatorium (in which medical, surgical, obstetrical, and pediatric cases, and where men, women, and children, are treated) where three (3) years of training with a systematic course of instruction on the above-mentioned classes of cases is given in the hospital or other educational institution, or must have graduated from a training-school connected with a hospital of good standing, supplying a three (3) years' training corresponding to the above standard, which training may be obtained in two or more hospitals. All qualifications of the applicant shall be determined by the State Board of Examiners of Nurses for Georgia, which is empowered to prescribe such examinations for the applicants as will best test their fitness and ability to give efficient care to the sick. All applicants at the same examination shall be subject to the same kind of examination; provided that the said board shall have the power to grant advanced credit, not in any case of excess of twelve (12) months, for didactic and laboratory work done in an accredited college, or for credits either time or scholastic, earned in an institution other than the one from which graduated.

§ 1711(13). Registration without examination.—All nurses graduating on or before June 1, 1909, from such training-schools as are referred to in the preceding sections shall be, by that fact, entitled to registration without examination, upon paying the application fee of ten (\$10.00) dollars, as provided in this Act, and submitting sufficient evidence of good moral character. Nurses who shall show to the satisfaction of the said board that they are graduates of training-schools connected with a hospital or sanatorium, giving two years' systematic course of instruction, or if they graduated before or during the year 1897 from such a school giving one year's training, and who are in good moral and professional standing, and are engaged in the practice of the profession of nursing at the passage of this Act, also nurses in training at the time of the passage of this Act and shall graduate hereafter and possess the qual-

ifications herein specified, shall, upon the payment of the application fee, be entitled to registration without examination, provided application is made for registration on or before February 1, 1928. There may be an appeal from the judgment of the said board by the party who is refused a license by the board, or whose license is revoked, as the case may be, if dissatisfied with the judgment, to a jury of the Superior Court of the county of the residence of such dissatisfied party; said appeal to be had as in other cases now provided by law.

§ 1711(14). Nursing without certificate from board; penalty.—After the expiration of six months from the passage of this Act it shall be unlawful for any person or persons to practice professional nursing as a graduate nurse or registered nurse in this State without a certificate from said board; and any person violating any of the provisions of this Act shall be guilty of misdemeanor, and upon conviction thereof shall be punished in accordance with section 1065 of the Penal Code of the State of Georgia. Each graduate nurse who registers in accordance with the provisions hereof shall be styled and known as a registered nurse, and no other nurse shall assume or use such title, or use the abbreviation "R. N.," or any other letters, words, or figures to indicate that he or she is a graduate or registered nurse; and a violation hereof shall be deemed a misdemeanor, and shall upon conviction be punished accordingly. Annually during the months of January or February every registered nurse of Georgia shall be required to have her certificate validated by the issuance of a card attesting to her right to practice as a registered nurse for the current year. This request for validation shall be accompanied by a fee of one (\$1.00) dollar, and sent to the secretary of the State Board of Examiners of Nurses for Georgia. On March 1 of each year the roster of nurses who have validated their certificates shall be taken; and the same shall be printed within sixty days thereafter in such form and manner as may be determined by the board. Any certificates not validated may be revoked.

§ 1711(15). Licenses to undergraduate nurses.—The Board of Examiners of Nurses shall issue a license to engage in the care of the sick to undergraduate nurses. Each applicant must be at least nineteen (19) years of age, of good moral character, must present to the Board of Examiners a certificate showing that he or she has had at least twelve (12) months training in a regular chartered training-school for nurses connected with a general hospital or sanatorium, in which medical, surgical, obstetrical, and pediatric cases, and where men, women and children are treated.

§ 1711(16). Fee from undergraduate nurse.—It shall be the duty of said board of Examiners to determine all the qualifications of applicants, and provide for examination for license for undergraduate nurse. Upon filing application for examination and registration as a licensed undergraduate nurse, each applicant shall pay a fee of five (\$5.00) dollars, and annually during the months of January or February every licensed undergraduate nurse shall be required to have her certificate val-

idated by the issuance of a card attesting to her right to practice as a licensed undergraduate nurse for the current year. This request for validation shall be accompanied by a fee of fifty (50) cents. Any certificate not validated may be revoked. This shall not apply to attendants or orderlies employed in hospitals. All undergraduate nurses, practicing at the passage of this Act, and possessing the qualifications herein specified, shall, upon the payment of the application fee, be entitled to registration without examination, provided application is made for registration on or before February 1, 1928. After the expiration of six months after the passage of this Act, it shall be unlawful for any person or persons to practice as undergraduate nurse in this State without a certificate from said Board of Examiners, except in hospitals; and any person violating any of the provisions of this Act shall be guilty of misdemeanor, and upon conviction thereof shall be punished in accordance with section 1065 of the Penal Code of the State of Georgia. Each licensed undergraduate who registers in accordance with the provisions hereof shall be styled and known as a licensed undergraduate nurse, and no other persons shall assume or use such title, or use the abbreviation "L. U. N.," or other letters, words, or figures for the purpose of representing that he or she is a licensed undergraduate nurse within the meaning of this Act.

§ 1711(17). Emergency nursing.—This Act shall not be construed to affect or apply to gratuitous nursing of the sick by friends of the family, or as an emergency aid. And this shall not be construed to affect a situation in the event of public emergency pronounced by the State Board of Health to exist in the State at large, or any part thereof, or in the event of an emergency declared by national health authorities, requiring nursing service within or without the State, in which case unlicensed persons may be permitted to nurse or care for the sick for hire during the continuance thereof.

§ 1711(18). Revocation of certificate; notice to holder.—The said board may revoke any certificate issued by it, for sufficient cause to be adjudged by it; but no such certificate shall be revoked without a hearing, notice of the time and place of which shall be given to the holder of the certificate by the secretary at least (30) days before the day set for said hearing, which notice shall plainly set forth the charges against the holder of said certificate, and the trial shall be only upon the grounds specified. Said notice shall be mailed to the said person so accused, at his or her last known address, postage prepaid; or the same shall be delivered personally to the person so accused. The presiding officer of the said board is authorized and empowered to administer oaths to all witnesses giving evidence at such hearing, and no evidence shall be received at such hearing if the same is not under oath.

§ 1711(19). Salary of secretary.—Out of the funds of the said board, accruing from the application fees herein provided, the secretary of said board shall be paid a salary and all necessary expenses, the salary to be determined by the said

Board of Examiners. The members of the board shall be entitled out of the funds to receive not less than six (\$6.00) dollars per day for each day actually engaged in the service of the board, and all necessary expenses. All payments out of said funds, or any funds of the board, shall first be approved by the presiding officer of said board. Be it further enacted, that one or more persons be employed by the board, to work under the direction of the secretary, and to be paid out of funds accruing from application fees, to assist in carrying out the rules and regulations adopted by the said board, and for giving advice and encouragement to nurse-training schools in preparing applicants for registration. Duties and salaries shall be determined by the board, and shall be paid as other expenses are paid.

§ 1711(20). Certificates of registration without examination.—The Board of Examiners shall have authority to issue certificates of registration without examination to graduate nurses of a State other than Georgia, or of a foreign country, who hold bona fide certificates of registration issued under the laws of such a State or foreign country; provided, the standards of registration are equivalent to those provided in this Act, and the individual qualifications of the nurse meet the requirements of this Act. The registration fee of ten (\$10.00) dollars for graduate nurses herein provided shall accompany each application for a certificate. Be it further enacted, that the Board of Examiners shall have authority to issue a certificate of registration or license without examination to undergraduate nurses registered in a State other than Georgia, or of a foreign country, whose qualifications meet the requirements of this Act. The registration fee of five (\$5.00) dollars, as herein provided for undergraduate nurses, shall accompany each application for certificate.

§ 1711(21). Continuation of members of existing board; its books, etc., to be property of new board.—The membership of the present Board of Examiners of Nurses for Georgia shall continue for the terms for which each member was chosen or appointed; and that the books, records, files, furniture, and property of the present board shall be the property of the board herein created. The board herein created shall be the successor or continuation of the board now in existence, and the acts of the present board heretofore done shall continue to be in all respects valid and lawful, and all registrations heretofore made or authorized by the said present board shall continue of full force and effect.

§ 1711(22). Nurses not affected by this Act.—The provisions of this Act shall not affect nurses known as practical nurses, not holding themselves out to be either graduate or undergraduate nurses within the meaning of this Act.

CHAPTER 11

State Board of Embalming

§ 1717(4). Disinterred bodies.

As to permit where family consents to disinterment, see note to P. C. 408.

CHAPTER 12

State Board of Pharmacy

§§ 1722 to 1731.—Repealed by the Act of 1927, pp. 291 et seq., herein codified as §§ 1731(1) et seq.

§§ 1731(a)-1731(y). Park's Code.

See §§ 1731(1)-1731(24).

§ 1731(1). Georgia Board of Pharmacy created.—There is hereby created and established a board to be known as the Georgia Board of Pharmacy, with the duties and powers as are hereinafter in this Act provided. Acts 1927, p. 291.

§ 1731(2). Members of existing board to be on new board.—Said board shall consist of five (5) members, and the members of the now existing Georgia State Board of Pharmacy shall continue in office and act as members of the said Georgia Board of Pharmacy hereby created, with all the duties and powers as herein provided, until their respective terms of office expire, the vacancies as they may occur to be filled in keeping with the requirements of this Act.

§ 1731(3). Governor to commission members; term 5 years.—Members of said Georgia Board of Pharmacy shall be commissioned by the Governor, and shall serve for a term of five (5) years, or until their successors are duly appointed and qualified. No person shall be eligible for appointment to membership on said board who is not a licentiate of the Board of Pharmacy of the State of Georgia, and who has not been actually engaged for a period of five (5) years or more in the retail drug business. If any member of said board after his appointment and qualification shall cease to be actually engaged in the retail drug business, his membership on said board shall at once become vacant; nor shall any person be eligible to appointment on said board who has any official connection with any school or college of pharmacy, and if any member of said board shall, after his appointment and qualification, become connected with any school or college of pharmacy, his membership on said board shall immediately become vacant. No member of the board who has served one full term shall be eligible to reappointment until there has intervened a period of one (1) full term from the date of the expiration of his membership to the date of his reappointment.

§ 1731(4). Annual election of member for next vacancy.—The Georgia Pharmaceutical Association shall from its membership annually elect one member for the next occurring vacancy on said board, who shall meet the qualifications as required by this Act. When regularly submitted to him by the secretary of the said association, the Governor shall make the appointment for the vacancy occurring in said board.

§ 1731(5). Unexpired term.—Vacancies occurring other than by expiration of the term of a member shall be filled for the unexpired term

only by the member receiving next highest number of votes at last annual convention of the Georgia Pharmaceutical Association.

§ 1731(6). Oath of appointee.—The appointee to said board shall immediately after his appointment take and subscribe to an oath or affirmation, before a qualified officer, that he will faithfully and impartially perform the duties of the office, which oath shall be filed with the Secretary of State; whereupon the Secretary of State shall issue to said appointee a certificate of appointment.

§ 1731(7). Pay of members.—The members of said board shall receive as their compensation the sum of fifteen dollars (\$15.00) per day while in the actual performance of their duties as members of said board, and in addition shall receive their actual traveling expenses while in the performance of their duties on said board, such compensation to be paid out of the funds received by said board under the provisions of this Act.

§ 1731(8). Organization of board.—The said board shall, as soon as practicable after this Act becomes effective, meet and organize and from their members elect a president, a vice-president, and a secretary.

§ 1731(9). Secretary's salary.—The said secretary shall be paid a salary for his services, the amount of the same to be fixed by said board, and paid out of said funds.

§ 1731(10). Examinations by board, time of.—The said board shall meet for examination of applicants for licenses at such place or places, and at such times, as the board may decide. In no case shall the board hold more than three meetings annually.

§ 1731(11). Drugs to be compounded only by or under supervision of registered pharmacist.—It shall be unlawful for any proprietor, owner, or manager of any drug-store or pharmacy to allow any person in his employ except a registered pharmacist to compound or mix any drugs, medicines, or poisons for sale, except an employee under the immediate supervision of a registered pharmacist.

§ 1731(12). Qualifications of Applicants.—Applicants for registered pharmacists must be not less than twenty-one (21) years of age, and shall have at least a high school education with a minimum of sixteen (16) units as are designated by the Association of Accredited Schools, and not less than thirty-six (36) months experience in a drug store or place where poisons are dispensed by a licensed vendor registered under the laws of the State of his abode, or in lieu of the foregoing a graduate of a recognized school of pharmacy; provided, this Act shall not be construed to affect a person who has had three (3) years practical experience under the direct supervision of a registered pharmacist at the time of the passage of this Act.

§ 1731(13). Examination fee.—Applicants for examination as registered pharmacists under this Act shall pay to said board an examination fee of fifteen dollars (\$15.00). All fees shall be paid to the secretary of said board at the time of the filing of the application for examination. Any applicant failing to make the required mark is entitled to another examination without any additional charge, provided he takes the second examination within one (1) year from the first.

§ 1731(14). License to one registered in another State.—The said board may in its discretion grant licenses as pharmacists to persons who furnish proof that they have been registered as such in some other state, and that they are of good moral character; provided that such other State in its examination requires the same general degree of fitness as is required by the examination in this State.

§ 1731(15). Election of representative to meeting, of association of other States.—The said board, in order to determine and be informed of the status of the boards of other States desiring reciprocal registration, and in order to be advised also regarding the progress of pharmacy throughout the country, may annually elect one of their members to meet with like representatives from other State Boards of Pharmacy, the expenses of such member in attending such meeting to be paid out of the funds received by the said board under the provisions of this Act. The said board through its representatives may, with like representatives from other State Boards of Pharmacy, join in creating and maintaining an Association of members of the several States, to be engaged in the general advancement of pharmacy and the keeping of records of reciprocal registration.

§ 1731(16). Refusal or revocation of license.—Said board may refuse to grant a license to any person found guilty of a felony, or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him or her unfit for the practice of pharmacy, and may after due hearing revoke a license for such cause, or revoke any license which has been procured by fraud.

§ 1731(17). Who may compound or sell drugs, etc.—No person shall engage in the compounding or vending of medicines, drugs, or poisons within the State without full compliance with this Act, except: (1) such druggists as are exempted from the operation of the present law by the statute of the State of Georgia, and such druggists as have heretofore obtained a license and are legally authorized by existing laws to compound and vend drugs, poisons, and chemicals; (2) physicians putting up their own prescriptions and dispensing medicines from their own offices. (3) This item shall be construed in the interest of the public health, and shall not be construed to prohibit the sale by merchants of home remedies, not poisons, or the sale by merchants of prep-

arations commonly known as patent or proprietary preparations when sold only in the original and unbroken packages, Paris green, arsenate of copper, arsenate of lead, or preparations containing any of these articles used for killing Lincoln-bugs, cabbage-worms, caterpillars, all and similar insects, provided the labels, cartons, and packages containing such preparations have the word "Poison" printed across the face, and conform to the United States Pure Food and Drug Act, and general merchants other than druggists shall not be required to register under the provisions of this Act.

§ 1731(18). **Duty of board as to examination, license, prosecution.**—It shall be the duty of said board to examine all applicants for licenses under the provisions of this Act submitted in proper form, and to grant certificates of licenses to such persons as may be entitled to the same. It shall further be the duty of said board to cause the prosecution of all persons violating the provisions of this Act, and in all such prosecutions the burden shall be upon the defendant to show his authority.

§ 1731(19). **Fees to go to fund in State Treasury for pay and expenses of board.**—All monies paid to the secretary in fees or from other sources shall be paid by him into the Treasury of the State of Georgia and there held by the State Treasurer for the payment of the compensation and expenses by said board and secretary; the funds arising under the provisions of this Act being hereby especially allocated under the authority of the General Assembly of Georgia for this purpose. After the compensation of said board, the salary of the secretary, and expenses of said board and secretary have been paid, the board shall have the right to establish a reserve or emergency fund not in excess of \$1,000.00, and all surplus over and above the above-mentioned expenses and the above-mentioned surplus shall, on the first day of January of each year, revert to the Treasury of Georgia, to be placed in the general fund of the State.

§ 1731(20). **Meaning of "drug-store," "pharmacy," "apothecary."**—The term "drug-store," "pharmacy," or "apothecary," wherever used in this Act, shall be construed to mean a place where drugs, medicines, or poisons are dispensed, compounded, or sold at retail under the direction and direct supervision of a person who is duly licensed and registered by the Georgia Board of Pharmacy to practice in Georgia.

§ 1731(21). **Unlawful use of title "drug-store," etc.**—It shall be unlawful for any person in connection with any place of business or in any manner to take, use, or exhibit the title "drug-store," "pharmacy," "apothecary," or any combination of such titles or any title or description of like import or any synonym or other term designated to take the place of such title, unless such place of business is in fact and in truth a drug-store or pharmacy as defined in this Act.

§ 1731(22). **Annual registration.**—All persons now lawfully engaged in compounding and vending medicines, drugs, and poisons in this State, shall, on or before the first day of January following the passage of this Act, and every person who shall be hereafter duly licensed under the provisions of this Act shall, before engaging in any business under said license, register in the office of the Secretary of the Georgia Board of Pharmacy annually; said registration shall be entered in a book to be kept for that purpose by said secretary, his name, nationality, and credentials and date thereof under which he is entitled to engaged in such vocation at the time of filing such registration, and a certificate of such registration, stating the terms of the same, shall be given him by said secretary.

§ 1731(23). **Power to make rules.**—The said Georgia Board of Pharmacy herein provided shall have the power and authority to make rules and regulations governing the action of the board, and to make such other rules and regulations as they deem necessary to carry out the intent and provisions of this Act.

§ 1731(24). **Violation a misdemeanor.**—Any violation of any provision of this Act shall be a misdemeanor, and the person so offending shall be punished as prescribed in section 1065 of the Penal Code.

CHAPTER 15C

Regulation of Billiard Rooms

§ 1762 (20). Billiards defined.

Exercise of Police Power.—The operation of a pool or billiard room for public entertainment is a business which, from its very nature, comes within the police power of the State. Such power may be exercised directly by the State or indirectly through the medium of the subordinate public corporations of the State. *Shaver v. Martin*, 166 Ga. 424, 143 S. E. 402.

CHAPTER 17

Motor Vehicle Laws

ARTICLE 2

Acts 1915, Ex. Sess., and Amendatory Acts

§ 1770(a). Park's Code.

See § 1770(61).

§ 1770(yy). Park's Code.

See § 1762(20).

§ 1770(fff). Park's Code.

See § 1770(26).

§ 1770(hhh). Park's Code.

See § 1770(28).

§§ 1770(ffff)-1770(gggg). Park's Code.

See § 1896(5).

§§ 1770(pppp)-1770(qqqq). Park's Code.

See §§ 1896(13)-1896(14).

§ 1770(xxxx-1). Park's Code.

See § 1896(5).

§ 1770(xxxx-2). Park's Code.

See § 1896(13).

§ 1770(26). Schedule of annual fees for vehicles; registry and license of manufacturers and dealers; number plates; tags for purchasers; penalty.

Constitutionality.—The act is not unconstitutional because it undertakes to tax automobiles, for the construction of public roads, and that there is no authority in the General Assembly of Georgia to tax personal property in order to raise a fund for the construction of public roads, §§ 6358 and 6359, or the fourteenth amendment of the Constitution of the United States. *Lee v. State*, 163 Ga. 239, 135 S. E. 912.

The act is not unconstitutional upon the ground that it violates the constitution, § 6554, which provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property taxed. *Lee v. State*, 163 Ga. 239, 135 S. E. 912.

The tax is not a property tax. *Lee v. State*, 163 Ga. 239, 135 S. E. 912.

§ 1770(28). Display of number-plate.

Constitutionality.—This section is not open to attack on the ground that it was not one of the subjects included in the Governor's proclamation convening the legislature in extraordinary session. *Lee v. State*, 163 Ga. 239, 135 S. E. 912.

ARTICLE 3

Acts 1921, pp. 255 et seq.

§ 1770(50). Equipments.

Purpose of Regulation.—The purpose of these several regulations of motor-vehicles is the protection of the lives and limbs of all persons upon or using such streets and highways, not only those who may be met, overtaken, or passed by the driver, but as well for the protection of those who may accompany him. *Black v. State*, 34 Ga. App. 449, 451, 130 S. E. 591.

Presumption as to Compliance.—With nothing appearing to the contrary, it will be assumed that the automobile was duly equipped with "front lamps" and that they were "throwing strong white lights to a reasonable distance in the direction in which such vehicle is proceeding," in accordance with the requirements of the section. *Macon v. Jones*, 36 Ga. App. 799, 803, 138 S. E. 283.

Insufficient Brakes as Negligence Per Se.—The operation of a truck along the public streets not equipped with efficient and serviceable brakes, constituted negligence per se. *Orange Crush Bottling Co. v. Smith*, 35 Ga. App. 92, 132 S. E. 259.

This section is not unconstitutional and void because it amends, without proper reference thereto, the act of 1919, which regulates the use of motor-vehicles, and makes penal the operation of such vehicles on a public highway while the operator is drunk. *Durham v. State*, 166 Ga. 561, 144 S. E. 109.

§ 1770(51). Speed limit; intersections, etc.; pedestrians, horses, etc.; passing stationary street cars, etc.

Insufficient Brakes Negligence Per Se.—The trial court did not err in instructing the jury that the law requires motor-vehicles while in use upon the public streets to be equipped with efficient and serviceable brakes, and that the operation of the truck along the public streets not so equipped constituted negligence per se. *Orange Crush Bottling Co. v. Smith*, 35 Ga. App. 92, 132 S. E. 259.

Section Applied.—A charge to the effect that whenever the operator of any vehicle along a public highway shall meet a vehicle approaching from an opposite direction, the operator of the first vehicle shall turn to the right, was held applicable to the conduct of the plaintiff. *Hornbrook v. Reed*, 35 Ga. App. 425, 133 S. E. 264.

Not Applicable to Intersecting City Streets.—The second paragraph of this section does not apply to "intersecting streets of a city." *Shannon v. Martin*, 164 Ga. 872, 139 S. E. 671. The court said: "In view of this decision, and and upon request of counsel for the plaintiff in error, the case of *Faggart v. Rowe*, 33 Ga. App. 423, 126 S. E. 731, is reviewed, and any contrary ruling therein is hereby overruled." *Shannon v. Martin*, 37 Ga. App. 343, 140 S. E. 425.

Railroad Crossing in Cities.—The provisions of this section apply to railroad crossings in a city. *Atlanta, etc., R. Co. v. West*, 38 Ga. App. 300, 302, 143 S. E. 785.

Defendant Owner in Car.—The exact question here involved seems not to have been decided by this court. But in other jurisdictions it has been decided. In *Commonwealth v. Sherman*, 191 Mass. 439, 78 N. E. 98, the fourth headnote is as follows: "In a prosecution for operating an automobile at an excessive rate of speed, proof that the machine, which was registered with the Massachusetts Highway Commission by defendant in his own name, was being run by the operator at an illegal speed while defendant was in the tonneau, established prima facie that defendant, having power to control the machine, either knew, or allowed it to be illegally run, and was therefore guilty." *Moreland v. State*, 164 Ga. 467, 470, 139 S. E. 77.

No Exception in Favor of Police Officers.—This section limiting the speed of motor vehicles approaching a sharp curve contains no exception in favor of police officers. *Hudson v. Carton*, 37 Ga. App. 634, 141 S. E. 222.

§ 1770(52). Passing moving vehicles.

Constitutionality.—So much of the section as undertakes to make penal the failure of the operator of a motor-vehicle, when meeting a vehicle approaching in the opposite direction, to "turn his vehicle to the right so as to give one half of the traveled roadway, if practicable, and a fair opportunity to the other to pass by without unnecessary interference" is too uncertain and indefinite in its terms to be capable of enforcement. *Heath v. State*, 36 Ga. App. 206, 136 S. E. 284. See also *Hale v. State*, 21 Ga. App. 658, 94 S. E. 823, holding the corresponding section of the Act of 1915 [§ 1770(34)] unconstitutional.

What Constitutes Meeting.—Where a motor-car traveling along a public highway has been brought to a stop in the highway, and another car is approaching it from the front, both cars, notwithstanding one is stationary, are meeting each other in the sense of the section. *Roberts v. Phillips*, 35 Ga. App. 743, 134 S. E. 837.

Passage on Narrow Bridge.—Charges in an indictment that the defendant failed and refused to give the deceased a fair opportunity to pass by without unnecessary interference it being practical to give one-half of the travelled roadway, were not sustained by the proof, where the evidence showed that the cars collided on a temporary bridge which was less than twelve feet wide and too narrow to permit two automobiles to pass each other thereon. *Shupe v. State*, 36 Ga. App. 286, 287, 136 S. E. 331.

Bridges—Sufficiency of Guard-Rails.—There is no legal duty on a railroad company to construct the guard-rails of a bridge sufficiently strong to withstand the impact of an automobile going at the rate of twenty to twenty-five miles per hour. *Corley v. Cobb County*, 21 Ga. App. 219, 93 S. E. 1015; *Eberhart v. Seaboard Air-Line R. Co.*, 34 Ga. App. 49, 55, 129 S. E. 2.

Applied in Kamper Grocery Co. v. Sauls, 38 Ga. App. 487, 144 S. E. 403.

§ 1770(53). Warning.

Sounding Horn at Intersections.—There is no statute in

this State requiring the operator of a motor-vehicle to sound a horn or give any other warning on approaching the intersection of public streets or highways, unless such intersection is a "dangerous place upon such street or highway." *O'Donnelly v. Stapler*, 34 Ga. App. 637, 131 S. E. 91.

An allegation that defendant failed to give any warning whatever on approaching an intersection did not amount to a charge of negligent violation of a statute, although it sufficiently specified, in connection with other parts of the petition, that the defendant was negligent in the violation of his duty to exercise ordinary care to avoid injury to the plaintiff's automobile at such intersection. *O'Donnelly v. Stapler*, 34 Ga. App. 637, 131 S. E. 91.

§ 1770 (54). Accidents.

Petition Held Subject to Special Demurrer.—The petition in this case, by which the plaintiff sought to recover for injuries inflicted by an automobile when he was walking on a public highway, and which alleged, as specific acts of negligence contributing to the injuries, the failure of the defendants to stop after the infliction of the injuries, and their failure to give the name and address of the operator and the name and address of the owner of the automobile as required by this section was subject to the special demurrer as to these and other allegations in regard to the conduct of the defendant after the injuries had been inflicted. *Springer v. Adams*, 37 Ga. App. 344, 140 S. E. 390.

§ 1770(55). Chauffeur's license.

Reads to Which Applicable.—While it is unlawful for a minor under sixteen years of age to operate a motor vehicle upon the public highways, the rule is not applicable to roads which are not public streets or highways. *W. & A. R. R. v. Reed*, 35 Ga. App. 538, 544, 134 S. E. 134.

Effect of Presence of Owner—Experience.—It is unlawful for a minor under sixteen years of age to operate a motor-vehicle upon the highways of this State, whether he is accompanied by the owner of the machine or not, and regardless of experience. *Western, etc., Railroad v. Reed*, 35 Ga. App. 538, 544, 134 S. E. 134.

§ 1770 (56). Qualification of chauffeur.

The evidence authorized a conviction of a violation of that part of the motor-vehicle law which provides that no person shall take, use, or operate any motor-vehicle upon the public streets and highways without the permission of the owner. *Carter v. State*, 38 Ga. App. 132, 143 S. E. 441.

ARTICLE 3A.

Acts of 1927 pp. 226 et seq.

§ 1770(60a). Secretary of state, ex-officio commissioner of vehicles.—After the passage of this Act the Secretary of State shall be ex-officio Commissioner of vehicles of this State, and shall be charged with the execution of the Act hereafter enacted. Acts 1927 p. 227.

§ 1770 (60b). Definitions.—For the purpose of this Act the following definitions shall apply:

"Vehicle"—Any contrivance used for transportation of persons or property on public highways.

"Motor-vehicle"—Any vehicle, except tractors, propelled by power other than muscular power, not operated exclusively upon tracks.

"Motorcycle"—Any motor-vehicle having but two main wheels in contact with the ground, upon which the operator sits astride. A motorcycle may carry a one wheel attachment generally known as a side-car.

"Tractor"—Any self-propelled vehicle designed

for use as a traveling power-plant or for drawing other vehicles, but having no provision for carrying loads independently.

"Trailer"—Any vehicle without motive power, designed for carrying persons or property either partially or wholly on its own structure and for being drawn by a self-propelled vehicle, except those running exclusively on tracks.

"Pneumatic tires"—Tires of rubber and fabric inflated with air.

"Solid tires"—Tires of rubber or similarly elastic material that do not depend on confined air for the support of the load.

"Metallic tires"—Tires of any metal or other hard material.

"Manufacturer," "dealer"—Any person, firm, or corporation engaged in the manufacture, sale, purchase or leasing of motor vehicles or tractors.

"Owner"—Any person, firm, corporation or association holding title to a vehicle or having exclusive right to the use thereof for a period of more than thirty days.

"Operator"—Any person who drives or operates a motor-vehicle or tractor.

"Chauffeur"—An operator for hire.

"Local authorities"—All officers and public officials of the State, municipalities, and counties of the State.

"Trucks"—"A motor-vehicle for the transportation of property or non-passenger carrying motor-vehicles."

For the purpose of this Act—

A vehicle is considered equipped with pneumatic tires when pneumatic tires are used on all wheels.

A vehicle is considered equipped with solid tires when solid tires are used on two or more wheels.

A vehicle is considered equipped with metallic tires when metallic tires are used on two or more wheels.

The National Automobile Chamber of Commerce horse-power rating formula is hereby adopted as the standard for determining the horse-power of passenger-carrying vehicles.

§ 1770(60c). Registration.—That every owner of a motor-vehicle, trailer, tractor (except tractors used only for agricultural purposes) or motor-cycle shall, on or before the first day of February in each year, before he shall operate such motor-vehicle, tractor, trailer or motorcycle, register such vehicle in the office of the Commissioner of Vehicles, and obtain a license to operate the same for the ensuing year; and every chauffeur employed to operate motor-vehicles shall likewise register and obtain a license as hereinafter provided.

That application for the registration of a motor-vehicle, trailer, tractor or motorcycle shall be made to the Commissioner of Vehicles, upon blanks prepared by him for such purposes, by the owner. Such application shall contain a statement of the name, place of residence, and address of the applicant, together with a brief description of the vehicle to be registered, its name, model, the name of the manufacturer, its motor number, its shipping weight, carrying capacity, and such other information as the Commissioner of Vehicles may require.

Provided, that nothing in this Act shall be construed as repealing the Act approved August 22, 1925, requiring proof of ownership, certificate of registration and money-order receipt, fifteen-day permit, and penalty for violation of said Act, pages 315 to 317 inclusive of Georgia Laws of 1925.

That application for a chauffeur's license shall be made to the Commissioner of Vehicles upon blanks prepared for such purpose by him, and shall be signed and verified by oath or affirmation. Such application shall be made annually on or before the first day of February, and shall contain a statement of the name and address of the chauffeur, and such other information as the Commissioner of Vehicles may require, and shall be signed and endorsed by at least three responsible owners of motor-vehicles and employers of chauffeurs; provided that no such license shall be issued to any person under sixteen years of age. A fee of \$2.00 shall accompany the application. Upon receipt of such application and the payment of the required fee, the Commissioner of Vehicles shall file the application, register the same, assign to the applicant a distinctive number, and make the same a matter of record in his office. He shall likewise furnish such chauffeur a badge, which badge shall be evidence of his right to act as chauffeur until the first day of February of the next year following. Such badge shall be of aluminum or some other suitable metal, oval in form, the greater diameter not to exceed two inches and there shall be stamped thereon the words "Registered Chauffeur No. (Here insert the registration number designated) State of Georgia." The badges shall be of uniform size, numbered consecutively, beginning with the figure 1, and shall be issued in consecutive order and of different design each year. The chauffeur shall at all times, while operating a motor-vehicle upon public streets and highways, wear his badge pinned to his clothing in a conspicuous place. No registered chauffeur shall voluntarily or otherwise permit any other person to wear his badge, nor shall any person wear a chauffeur's badge belonging to any other person, or a fictitious badge, while operating a motor-vehicle upon the public streets and highways.

Exception that the court erred in changing the exact language of this section, because the accusation made no reference to the "owner" and did not warrant the charge, is not meritorious. *Cumbe v. State*, 38 Ga. App. 744, 145 S. E. 667.

§ 1770(60d). Registration, licensing, and permit fees.—The annual fees for licensing of the operation of vehicles shall be as follows for each vehicle registered:

| | |
|--|---------|
| A. Motorcycle..... | \$ 5.00 |
| B. Motorcycle side-car..... | 3.00 |
| C. Passenger-carrying motor-vehicles fifty (50) cents per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle; minimum fee. | 11.25 |
| For each non-passenger carrying motor-vehicle or truck of one ton capacity or less..... | 15.00 |
| For each non-passenger carrying motor-vehicle or truck of more than one and | |

| | |
|---|----------|
| not exceeding one and one half tons capacity..... | 22.50 |
| For each non-passenger carrying motor-vehicle or truck of one and one half tons and not exceeding two tons capacity..... | 30.00 |
| For each non-passenger carrying motor-vehicle or truck of more than two tons and not exceeding two and one half tons capacity..... | 37.50 |
| For each non-passenger carrying motor-vehicle or truck of more than two and one half tons capacity and not exceeding three tons capacity..... | 45.00 |
| For each non-passenger carrying motor-vehicle or truck of more than three tons capacity and not exceeding three and one half tons capacity..... | 52.50 |
| For each non-passenger carrying motor-vehicle or truck of more than three and one half tons capacity and not exceeding four tons capacity..... | 75.00 |
| For each non-passenger carrying motor-vehicle or truck of more than four tons capacity and not exceeding five tons capacity..... | 150.00 |
| For each non-passenger carrying motor-vehicle or truck of more than five tons capacity and not exceeding six tons capacity..... | 375.00 |
| For each non-passenger carrying motor-vehicle or truck of more than six tons capacity and not exceeding seven tons capacity..... | 750.00 |
| For each non-passenger carrying motor-vehicle or truck of more than seven tons capacity..... | 1,125.00 |
| H. Trailers (or semi-trailers), when equipped with pneumatic tires, one dollar (\$1.00) per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle. | |
| K. Trailers (or semi-trailers), when equipped with solid tires, one dollar and fifty cents (\$1.50) per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle. | |
| L. Trailers (or semi-trailers), when equipped with metallic tires, two dollars (\$2.00) per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle. | |
| T. Tractors when equipped with pneumatic tires..... | 15.00 |
| V. Tractors equipped with solid or metallic tires or treads..... | 30.00 |

Provided, that tractors used exclusively for agricultural purposes shall not be required to register or to pay any fees.

Provided, that hearses and ambulances shall pay the rates prescribed for passenger-carrying motor-vehicles in paragraph C.

§ 1770(60e). Half-Rate fees between Aug. 1 and Jan. 1.—Where application is made for the registration of any vehicle or tractor between the dates of August 1st and January 1st of any year, the fee charged for such registration shall be one half the amount set forth in section 1770 (60d).

§ 1770(60f). Receipt for post-office order as permit.—When application is made for the registration of any vehicle or tractor and a United States post-office money-order is purchased for the correct fee and forwarded with said application, the receipt for said money-order, when dated by the proper authority, shall serve as a fifteen-day permit to operate the vehicle or tractor on the highways of the State.

§ 1770(60g). Registration of makers and dealers.—Manufacturers and dealers engaged in the manufacture, sale, or leasing of motor-vehicles or tractors shall register with the Commissioner of Vehicles, making application for a distinguishing dealer's number, specifying the name and make of motor-vehicle manufactured, sold, or leased by them, upon blanks prepared by the Commissioner of Vehicles for such purposes, and pay therefor a fee of twenty-five (\$25.00) dollars, which fee shall accompany such application, and for which said fee the Commissioner of Vehicles shall furnish to said dealers two number-plates to be known as a dealer's number and to be distinguished from the number-plates herein provided for by a different and distinguishing color to be determined by the Commissioner of Vehicles, with the word "Dealer" on same; dealer's number to be for the purpose of demonstrating or transporting dealer's vehicles for sale or lease. No dealer or manufacturer may use or permit to be used a dealer's number for private use or on cars for hire, or other manner not provided for in this section. In case dealers or manufacturers desire more than two tags, they shall so state on the application, and, in addition to the fee of twenty-five (\$25.00) dollars hereinabove provided, shall pay ten (\$10.00) for each and every additional number-plate furnished.

§ 1770(60h). Number-Plates—description, and how attached.—Upon receipt of the application and the payment of the required fee, the Commissioner of Vehicles shall file the application, register the vehicle, assign to it a distinctive serial number, and make the same a matter of record. He shall furnish also without cost two metal number-plates showing thereon the serial number designated to such vehicle. Number-plates shall be of metal at least seven (7) inches wide and not less than sixteen (16) inches in length, and shall show in bold characters the year of registration, serial number, and abbreviation of the name of the State, and such other distinctive markings as in his judgment the Commissioner of Vehicles may deem advisable, so as to indicate the class or weight of the vehicle for which the number-plates were issued. Duplicate number-plates, when one of the originals have been lost, defaced, or destroyed, may be obtained from the Commissioner of Vehicles upon filing affidavit setting forth the facts of such loss or destruction, and the payment of a fee of one dollar. A number, when issued, shall not be transferred from one vehicle to another, and shall not be used by any person or upon any motor-vehicle [other than the motor-vehicle] to which it is assigned, and any use of said number by any person or persons in any manner not provided for in this Act shall

be a violation of said Act; provided, however, that where a motor-vehicle has been duly registered in the office of the Commissioner of Vehicles, and the number assigned to said vehicle for the year, the owner of said motor-vehicle to which said number has been assigned may, upon sale or exchange of said motor-vehicle, transfer and assign the number assigned to said motor-vehicle to the purchaser of said machine, by registering such transfer in the office of the Commissioner of Vehicles and the payment of fifty cents, which shall accompany said transfer or registration, and upon said transfer the assignee of said number shall stand in the position of the original personal in whose name such number is recorded.

Every motor-vehicle, tractor, trailer, or motorcycle, which is in use upon the highways of the State, shall at all times display the number-plates assigned to it, and the same shall be fastened to both the front and rear of the machine in a position so as not to swing, and shall be at all times plainly visible. It shall be the duty of the operator of any motor-vehicle to keep both number-plates legible at all times.

Exception that the law on which count of the accusation was based and had been repealed by the act of 1927, is not meritorious, that count being grounded squarely upon this section. *Cumbe v. State*, 38 Ga. App. 747, 145 S. E. 667.

§ 1770(60i). Lights and brakes.—Every motor-vehicle, tractor, and motorcycle, while in use or operation upon the streets or highways of this State, shall at all times be provided and equipped with efficient and serviceable brakes and signaling device, consisting of a horn, bell, or other suitable device for producing an abrupt warning signal. Every motor-vehicle using the highways of this State at night shall be equipped with a lamp or lamps clearly visible for a distance of not less than one hundred feet from front and rear.

"Front Lamp"—Every motor-vehicle and tractor shall be provided with at least two lamps of approximately equal candle-power, mounted on the right and left sides thereof, and every motorcycle shall have mounted on the front thereof at least one lamp. The front lamps shall throw light to a reasonable distance in the direction in which such vehicle is proceeding. Front lamps shall be provided with a suitable device for dimming or changing focus, so as to prevent dangerously glaring or dazzling rays from the lamps in the eyes of approaching drivers.

"Rear Lamps"—Every motor-vehicle, tractor, and trailer shall have on the rear thereof, and to the left of the axis thereof, one lamp capable of displaying a red light visible for a distance of at least one hundred feet behind such vehicle; provided that when a vehicle is used in conjunction with another vehicle or vehicles, only the last of such vehicles shall be required to carry such lamp. Every motor-vehicle, tractor, trailer, or motorcycle, when on highways of this State at night, shall carry a lamp illuminating with white lights the rear registration plate of such vehicle, so that the characters thereon shall be visible for a distance of at least fifty feet.

Provided, that the provisions of this section as to lights, horns, bells, and or other signalling devices shall not apply to tractors used exclusively

for agricultural purposes when and while being operated upon public roads between daylight and dark only; and such lights, horns or other, signalling devices shall not be required for such agricultural tractors not using the public roads.

Provided, that the provisions of this Act requiring front and rear lights on vehicles shall not apply to horse or mule drawn vehicles or other vehicles drawn by muscular power.

§ 1770(60j). **Non-Residents License.**—Motor vehicles owned by non-residents of the State may be used and operated on the public streets and highways for a period of thirty days without having to register and obtain a license to do so or a chauffeur's license; provided, that the owner or owners thereof shall have fully complied with the laws requiring the registration of motor-vehicles in the State or Territory of their residence, and that the registration number and initial letter of such State or Territory shall be displayed and plainly visible on such vehicle or vehicles. In other respects, however, motor-vehicles owned by non-residents of the State and in use temporarily within the State shall be subject to the provisions of this Act; provided, no resident of this State shall be allowed to operate a motor-vehicle within this State under a license issued by another State.

§ 1770(60k). **Restrictions as to speed.** — No persons shall operate a motor-vehicle upon any public street or highway at a speed greater than is reasonable and safe, having due regard for the width, grade, character, traffic, and common use of street or highway, or so as to endanger life or limb or property in any respect whatsoever; but said speed shall not exceed those tabulated below:

| Total gross combined weight of motor vehicle and load in pounds. | Speed in miles per hour | | |
|--|-------------------------|-------|-----------|
| | Kind of Tires | | |
| | Metallic | Solid | Pneumatic |
| Less than 10,000..... | 10 | 25 | 40 |
| 10,000 to 16,000..... | 8 | 20 | 25 |
| Over 16,000..... | 5 | 18 | 20 |

§ 1770(60l). **Restrictions as to traffic.**—Every person operating a vehicle upon the highways of this State shall observe the following traffic rules and regulations:

- a. All vehicles not in motion shall be placed with their right sides as near the right side of the highway as practicable, except on city streets where traffic is obliged to move in one direction only.
- b. Slow-moving vehicles shall at all times be operated as close to the right-hand side of the highway as practicable.
- c. An operator meeting another vehicle coming from the opposite direction on the same highway shall turn to the right of the center on the highway, so as to pass without interference.
- d. An operator of a vehicle overtaking another vehicle going in the same direction, and desiring to pass the same, shall pass to the left of the ve-

hicle overtaken, provided that the way ahead is clear of approaching traffic, but if the way is not clear he shall not pass unless the width of the roadway is sufficient to allow his vehicle to pass to the right of the center thereof in the direction in which his vehicle is moving; provided further, that no operator shall pass a vehicle from the rear at the top of a hill or on a curve where the view ahead is in any way obscured or while the vehicle is crossing an intersecting highway. An operator overtaking and desiring to pass a vehicle shall blow his horn, and the operator of the vehicle so overtaken shall promptly, upon such signal, turn his vehicle as far as reasonably possible to the right in order to allow free passage on the left of his vehicle.

e. An operator in rounding curves shall reduce speed and shall keep his vehicle as far to the right on the highway as reasonably possible.

f. An operator intending to start, to stop, or to turn his vehicle to the left or right shall extend the hand and arm horizontally from and beyond the left side of the vehicle.

g. An operator of a vehicle shall have the right of way over the operator of another vehicle who is approaching from the left in an intersecting highway, but shall give the right of way to an operator of a vehicle approaching from the right on an intersecting highway.

h. An operator of a vehicle shall bring the same to a full stop not less than five feet from the rear of any street-car or passenger-carrying bus headed in the same direction, which has stopped for the purpose of taking on or discharging passengers, and shall remain standing until such car has taken on or discharged said passengers; provided, however, that said operator may pass such street car where a safety zone is established by proper authorities, or where said operator may pass such car at a distance of at least eight feet therefrom, and provided further that he shall have slowed down and proceeded cautiously.

i. An operator shall reduce speed at crossing or intersection of highways, on bridges, or sharp curves and steep descents, and when passing any animal being led on the highway.

j. An operator shall not use the cut-out of a motor-vehicle while on the highways of this State.

k. An operator of a motor-vehicle or tractor shall sound his horn or other signalling device when approaching points on the highways where the view ahead is not clear or where the view of the side of an intersecting highway is obstructed; provided that in no such case shall such horn or signalling device be used for the purpose of making unnecessary noise.

l. All vehicles carrying poles or other objects which project more than five feet from the rear shall, during the period of from one half hour after sunset to one half hour before sunrise, carry a red light at or near the rear end of the pole or other object so projecting. During the period of from one half hour before sunrise to one half hour after sunset vehicles shall carry a danger-signal at or near the rear end of pole or other object so projecting.

§ 1770(60m). Restriction as to operators. — No person shall operate a motor-vehicle or motorcycle upon any public street or highway, whether as owner or operator of such vehicle, if under sixteen years of age, or while under the influence of intoxicating liquors or drugs; and no person shall take, use, or operate any motor-vehicle or motorcycle upon the public streets and highways without the permission of the owner thereof.

§ 1770 (60n). In case of accident.—In case of accident to any person or damage to any property upon the public street or highway, due to the operation of a motor-vehicle, tractor, or trailer thereon, the operator of such machine shall immediately stop, and, upon request of the person injured or sustaining damage thereby, or of any other person present, give such person his name and address, and if he is not the owner of such vehicle, then in addition the name and address of the owner thereof, and further he shall render such assistance as may be reasonable or necessary.

The last clause of section 14 if the motor-vehicle law of 1927 (Ga. L. 1927, p. 239), to wit, "he shall render such assistance as may be reasonable or necessary," is too vague, indefinite, and uncertain to be capable of enforcement, and therefore can not properly form the basis of a criminal prosecution. For this reason the court erred in overruling the demurrer to the accusation. *Hurst v. The State*, 39 Ga. App. 522, 147 S. E. 782.

§ 1770 (60o). Restriction as to size. — No vehicle shall be operated on the highways of this State whose width, including load, is greater than ninety-six (96) inches (except traction engines, whose width shall not exceed one hundred and eight (108) inches, a greater height than twelve (12) feet, six (6) inches, or a greater length than thirty (30) feet; and no combination of vehicles coupled together shall be so operated whose total length, including load, shall be greater than eighty five (85) feet; provided, that in special cases vehicles whose dimensions exceed the foregoing may be operated under permits granted as hereinafter provided.

§ 1770 (60p). Restriction as to weight. — No vehicle of four wheels or less, whose gross weight, including load, is more than 22,000 pounds, no vehicle having a greater weight than 17,600 pounds on one axle, and no vehicle having a load of over eight hundred (800) pounds per inch width of tire upon any wheel concentrated upon the surface of the highways (said width in the case of rubber tires to be measured between the flanges of the rim) shall be operated on the highways of this State; provided, that in special cases vehicles whose weight, including loads, exceed those herein prescribed may be operated under special permits granted as hereinafter provided. Provided further, that the State Highway Commission may designate certain roads or sections of roads on the State-Aid Highway System on which the traffic requirements do not justify heavy type of pavement at the present time, and the said State Highway Commission may prescribe the maximum gross weight of vehicle, including load, which may be operated over the sections thus designated.

§ 1770 (60q). Restriction on wheels.—No load or vehicle any portion of which drags or slides on the surface of the roadways shall be used or transported on the highways of this State; no vehicle shall be used or transported on the highways of this State the wheels of which while being used or transported, either from construction or otherwise, cause pounding on the road surface. No vehicle equipped with solid rubber tires shall be used or transported on the highways of this State, unless every solid rubber tire on such vehicle shall have rubber on its entire traction surface at least one inch thick above the edge of the flange on the entire periphery. No vehicle shall be used or transported on the highways of this State the wheels of which have on the surface any wooden or metal cleets, spikes, corrugations, or other irregularities which tend to damage the surface of the road; provided that this section shall not be taken to prohibit the use of tire chains.

§ 1770 (60r). Permits for extra size or weight. — The special permit required by sections 1770(60p), 1770(60q) and 1770(60r) of this article, for the operation of a vehicle whose size or weight with load exceeds the limits prescribed by this Act, shall be in writing and be issued at the discretion of the State Highway Engineer of this State, or of those officials of the State's political subdivisions who have charge of the highways and bridges over which vehicle is to operate. Such permit may be issued for a single trip or for a definite period not beyond the expiration of the vehicle registration, and may designate the highways and bridges to be used.

§ 1770(60s). Municipal regulations of autos.—That nothing contained in this Act shall be construed as changing or interfering with any regulation or ordinance which has heretofore or may hereafter be adopted by any municipality of this State, regulating the running or operation of motor-vehicles described in this Act; and provided further, that nothing in this Act shall prevent cities and towns from regulating, by reasonable ordinance, the rate of speed except as provided hereinafter, noisy cut-outs, and glaring headlights within said cities and towns; provided, further that nothing herein shall prevent incorporated cities and towns from requiring by ordinance the owners of motor-vehicles residing within the incorporated limits of said cities or towns to register the number of State license with the clerk of council or other officer to be designated by such city or town, together with a brief description of such motor-vehicle, and said incorporated cities or towns shall have the power to provide a penalty for the violation of such ordinance; provided, no additional license fee shall be charged by any municipality.

§ 1770 (60t). Expense of operation.—That the necessary expenses to carry out the provisions of this law shall be defrayed out of the sums collected thereunder, and the amount thereof shall be fixed annually in advance upon an itemized budget-sheet submitted by the Commissioner of Vehicles, thirty days prior to the meeting of the

General Assembly, accompanied by an itemized report of the expenditures made for the preceding year, when approved by the Governor of this State. Said expense fund, or so much thereof as shall be needed, shall be drawn upon the warrants of the Governor, supported by bills of particulars and vouchers submitted by the Commissioner of Vehicles; provided said expense fund as shown by said approved budget-sheets shall be set aside out of the first collection made hereunder in any fiscal year, and provided the sums used to defray said expenses shall not exceed 5 per cent. of the total revenue derived under this Act.

§ 1770 (60u). Disbursement of fees.—That the full amount of the fees collected under this Act shall be turned over to the State Treasury by the Commissioner of Vehicles within thirty days after collection, in such manner as the State Treasurer may prescribe, and that it shall be the duty of the State Treasurer to set aside from said fees the sum authorized by the budget-sheet as prescribed under section 21 thereof.

§ 1770(60v). Salary Commissioner of Motor Vehicles.—The Secretary of State is hereby authorized to employ a clerk whose duty it shall be to keep a full record of all motor-vehicle owners in a book to be kept for that purpose. He shall file registration alphabetically by counties, and shall furnish each year to the county commissioner or ordinaries, and also the tax-receivers of the several counties, a list of all owners of motor-vehicles of their respective counties who have registered in this office. He shall perform any and every duty pertinent to his office under the direction of the Secretary of State. The salary of said clerk shall be two hundred dollars per month, payable out of the fees received for the registration of motor-vehicles; and the salary of the Commissioner of Motor Vehicles shall be one hundred and fifty dollars per month, payable out of the fees received for the registration of motor-vehicles.

§ 1770(60w). Throwing things on highways.—That every owner or operator of a machine shall have equal rights upon the highways of this State with all other users of such highways; and no person or persons shall throw glass, nails, tacks, or other obstructions upon the public highways used and traversed by automobiles, or unreasonably obstruct or impede the right of travel of such owner or operator while operating, propelling, or driving such machine; and no person or persons shall give any signal or signs of distress or danger or call for assistance upon a person lawfully operating any such machine on any of the public highways of this State, maliciously and without reasonable cause for so doing.

§ 1770(60x). Sheriff's duties defined—inspector.—That the Commissioner of Vehicles shall at least twice in each year call the attention of the sheriff's constables, and marshals in this State, to the provisions of this Act, and furnish once each quarter to the sheriffs and clerks of the county commissioners of each county, for file in his office, a list

of such vehicles as are registered from the county in which said sheriff and clerk hold office; and it shall be the duty of all local authorities in every county to make investigation as to the violation of the provisions of this Act, and said local authorities shall have authority, and it is hereby made their duty, to swear out warrant and prosecute any and all owners of motor vehicles who violate any of the provisions of this Act. The cost of the sheriffs, constables, and marshals shall be paid in the same manner as other criminal costs are paid under the law.

§ 1770(60y). Deputies from highway department, to enforce law.—It shall be the duty of the Commissioner of Vehicles to deputize such employees of the State Highway Department as may be requested by the State Highway Board, for the purpose of enforcing the provisions of this Act. The State Highway Board is hereby authorized to select from its employees men to be deputized by the Commissioner of Vehicles, and such deputies are hereby given the necessary police powers for the purpose of enforcing this Act. There shall be a motor-vehicle license inspector to be appointed by the Secretary of State, who shall have authority to swear out warrants for violations of the motor-vehicle law, and to perform any other duty required by the Secretary of State.

§ 1770(60z). Penalty for violation of this Act.—Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as for a misdemeanor. It is the duty of every arresting officer both county, municipal and State, to enforce the provisions of this Act.

§ 1770(60aa). Civil action not abridged.—Nothing in this Act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages sustained by reason of injury to a person or property, resulting from the negligent use of the public streets or highways by a motor-vehicle or motorcycle, or by its owner, his employee, or by any other operator thereof.

§ 1770 (60bb). Constitutionality of Act.—That should any of the provisions of this Act be held illegal or unconstitutional, the same shall not vitiate the remaining provisions of said Act, but all such provisions not held illegal or unconstitutional shall remain of full force and effect.

§ 1770(60cc). When effective.—This Act shall not take effect until February 1st, 1928; provided, however, that section 1770(60h) shall take effect on such date subsequent to February 1st, 1928, as the Commissioner of Vehicles in his direction finds practicable.

ARTICLE 3B

Automobile Dealers' Monthly Reports

§ 1770(60dd). Monthly reports to Secretary of

State; penalty.—Every person, firm, or corporation engaged in the business of selling automobiles shall be required to report in writing monthly to the Secretary of State, either by depositing said report in the United States mails or by sending the same by hand, a description of all cars sold by such dealer during that month, including the make of the machine sold, the number of the machine sold, and the name and address of the purchaser to whom sold, the said report to be sent in not later than the tenth of each month. Any person engaged in the business of selling automobiles who shall violate the provisions of this section, by failing to send in the report herein required, shall be punished as for a misdemeanor. Acts 1929, p. 213, § 1.

ARTICLE 3C

Motor Vehicle Carriers of 1929

§ 1770(60ee). Title of Act.—This act may be cited as "Motor-Carriers Act of 1929." Acts 1929, p. 294, § 1.

§ 1770(60ff). Definitions.—When used in this Act, unless expressly stated otherwise,—

(a) The term "person" shall include an individual, a firm, copartnership, corporation, an association or a joint stock association.

(b) The term "commission" means the Georgia Public Service Commission.

(c) The term "motor carrier" means every corporation or person owning, controlling, operating, or managing any motor-propelled vehicle (and the lessees, or receivers, or trustees thereof, appointed by any court whatsoever) used in the business of transporting persons or property for hire over any public highway in this State and not operated exclusively within the incorporated limits of any city or town; provided, that the term "motor carrier" as used in this Act shall not include, and this Act shall not apply to:

(1) Motor-vehicles engaged solely in transporting school children and teachers;

(2) Or operated exclusively in transporting agricultural, horticultural, or dairy, or other farm products from the point of production to market, when such motor-vehicle is owned or operated by the manufacturer or producer of such products;

(3) Motor-vehicles operated exclusively within the incorporated limits of cities or towns;

(4) Taxicabs, or trucks of baggage-transfer companies, which are operated principally within the incorporated limits of cities or towns, but which may in the prosecution of their regular business occasionally go beyond the limits of the city or town in which they operate, and which do not operate between such city or town and fixed termini outside of such city or town limits;

(5) Hotel passenger or baggage motor-vehicles when used exclusively for its patrons and employees.

(d) The term "public highway" means every public street, road, highway, or thoroughfare of any kind in this State used by the public:

(e) The term "certificate" means a certificate of public convenience and necessity, issued under this Act. Acts 1929, p. 294, § 2.

§ 1770(60gg). Commission's power to regulate.—The commission is hereby vested with power to regulate the business of any person engaged in the transportation of persons or property, either or both, for hire, by motor-vehicle on any public highway in this State. Acts 1929, p. 296, § 3.

§ 1770 (60hh). Motor carrier required to obtain certificate of public convenience and necessity.—(a) No motor carrier shall, after this Act goes into effect, operate without first obtaining from the commission, after hearing under the provisions of this Act, a certificate of public conveyance and necessity, pursuant to findings to the effect that the public interest requires such operation. A certificate shall be granted as a matter of right when it appears to the satisfaction of the commission that such motor carrier was actually operating on or before July 1, 1929, and continually since said date over the route for which such certificate is sought, in good faith, and adequately as to services, rates, and the protection of the public; and as to other applicants, preference shall be given to those operating in good faith at the time of the passage of this Act, over those commencing operation after the passage of same, provided the applicant shall comply with the provisions of this Act.

(b) The commission may issue the certificate prayed for, or issue it for the partial exercise only of the privilege sought; and may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public interest may require.

(c) The commission may at any time, after notice and an opportunity to be heard, suspend, revoke, alter, or amend any certificate issued under this Act, if it shall be made to appear that the holder of the certificate has wilfully violated or refused to observe any of the orders, rules, or regulations prescribed by the commission or any provision of this Act, or if, in the opinion of the commission, the holder of such certificate was not furnishing adequate service, or it is no longer compatible with the public interest to continue said certificate in force.

(d) Any such certificate may be transferred upon application to and approval by the commission, and not otherwise. Acts 1929, p. 296, § 4.

§ 1770(60ii) Bond for protection of public; limit of bond.—No certificate shall be issued or continued in operation unless the holder thereof shall give bond, with adequate security, for the protection, in case of passenger vehicles, of the passengers and baggage carried and of the public, against injury proximately caused by the negligence of such motor carriers, its servants or agents, and, in cases of vehicles transporting freight, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor carrier may be legally liable, and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or

agents. The commission shall approve, determine, and fix the amount for such bonds, in a sum of not more than \$10,000.00 for any one accident, casualty, or mishap, and not more than \$5,000.00 for anyone injured or damaged party or claimant, and shall prescribe the provisions and limitations thereof, and such bonds shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. The commission may, in its discretion, allow the holder of such certificate to file in lieu of such bond a policy of indemnity insurances in some indemnity insurance company authorized to do business in the State of Georgia, which policy must substantially conform to all of the provisions hereof relating to bonds, and must likewise be approved by the commission. The commission shall have power to permit self-insurance in lieu of a bond or policy of indemnity insurance, whenever, in its opinion, the financial ability of the motor carrier warrants. Acts 1929, p. 297, § 5.

§ 1770(60jj). Commission to prescribe rates, etc.—The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor carriers of passengers, baggage, and property and for all services rendered by motor carriers in connection therewith, and the tariffs therefor shall be in such form, and shall be filed and published in such manner and on such notice, as the commission may prescribe, and shall be subject to change on such notice and in such manner as the commission may prescribe. Acts 1929, p. 298, § 6.

§ 1770(60kk) Motor carrier must not charge discriminatory or reduced rates.—No motor carrier shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares, and charges prescribed or approved by order of the commission; nor shall any motor carrier unjustly discriminate against any person in its rates, fares, charges, or service; but the commission may prescribe by general order to what persons motor carriers may issue passes or free transportation, and may prescribe reduced rates for special occasions. Acts 1929, p. 298, § 7.

§ 1770(60ll). Chartered motor-vehicles. — No chartered motor-vehicles (which shall mean and include a motor-vehicle carrying for compensation more than six persons, hired for a specific trip or trips, and which is subject to the direction of the person hiring the same) may be operated except a motor carrier holding a certificate under this Act. Acts 1929, p. 298, § 8.

§ 1770(60mm). Mails, parcels, packages, may be carried; when.—Motor carriers may, as an incident to their business, carry mail, parcels and packages, under such rules and regulations as may be prescribed by the commission. Act 1929, p. 298, § 9.

§ 1770(60nn). White and colored passengers; separation of.—Motor carriers may confine themselves to carrying either white or colored passengers, or they may provide different motor-vehicles for carrying white and colored passengers; and they may carry white and colored passengers in the same vehicle, but only under such conditions of separation of the races as the commission may prescribe. Acts 1929, p. 298, § 10.

§ 1770(60oo). Baggage; limitation of liability for baggage.—Motor carriers shall not be compelled to carry baggage of passengers, except hand baggage; the character, amount, and size of which the motor carrier may limit by its rules or regulations, subject to the approval of the commission, and the commission may by rule or regulation limit the amount of the liability of the motor carrier therefor. If a motor carrier shall elect to carry the personal baggage of passengers (other than hand baggage), the commission shall prescribe just and reasonable rates therefor, and such other rules and regulations with respect thereto as may be reasonable and just, and may by rule or regulation limit the amount of the liability of the motor carrier therefor. Acts 1929, p. 299, § 11.

§ 1770(60pp). Schedules. — The commission shall have the power to fix and prescribe schedules, and the commission may withhold or withdraw its certificate, if, in its opinion, the service of the motor carrier is not adequate in all respects. Acts 1929, p. 299, § 12.

§ 1770(60qq). Discontinuance of service; notice of.—A motor carrier shall have the right to discontinue its whole service on any route upon 30 days published notice, and thereupon its certificate therefor shall be cancelled. A motor carrier shall have the right to discontinue any part of its service on any route upon 30 days published notice, subject, however, to the right of the commission to withdraw its certificate for such route, if in the opinion of the commission such diminished service is not adequate or any longer compatible with the public interest. Acts 1929, p. 299, § 13.

§ 1770(60rr). Railroad companies authorized to operate motor-vehicles for hire or to buy stock of motor carrier; when.—Railroad companies operating in this State are hereby authorized to operate motor-vehicles for hire upon the public highways, provided they obtain from the commission a certificate under this Act, and provided further that they shall be as to said motor-vehicles motor carriers under this Act, and subject to all the provisions of this Act; and railroad companies operating in this State are also authorized to own the whole or any part of the capital stock of a corporation or corporations organized or operating as a motor carrier. Acts 1929, p. 299, § 14.

§ 1770(60ss). Review of orders of commission.—In all respects in which the commission has power and authority under this Act, proceedings

may be instituted, complaints made and filed with it, process issued, hearings held, opinions, orders, and decisions made and filed, and any final order may be reviewed in any court of competent jurisdiction of this State, under the conditions and subject to the limitations as now prescribed by law as relates to the Georgia Public Service Commission. Acts 1929, p. 300, § 15.

§ 1770(60tt). Fees for issuance and transfer of certificates of convenience.—A fee of thirty-five (\$35.00) dollars shall be charged for the issue of every certificate of convenience and necessity, and a fee of seven and 50/100 (\$7.50) dollars for the transfer of a certificate, which shall be paid to the Comptroller-General when the commission has approved the application for the certificate, of which approval the commission has approved the application for the certificate shall notify the Comptroller-General; and no certificate shall issue until the said fee of \$35.00 has been paid. Acts 1929, p. 300, § 16.

§ 1770(60uu). Application for registration and license; fee \$25.—Every motor carrier shall, as soon as a certificate is issued and annually on or before each succeeding January 1st as long as such certificate remains in force, make application to the commission for registration and license of all motor-vehicles to be operated under said certificate, and, upon payment of a fee of \$25.00 dollars for each vehicle to the Comptroller-General, shall be entitled to register the same and receive a license therefor. The sum or sums derived herein from the issuance and transfer of certificates of convenience and necessity by the Comptroller-General shall be paid to the State Treasurer, who shall keep such sums thus paid to him in a separate fund and to be known as the motor-vehicle fund. From such funds thus derived the State Treasurer shall, upon proper warrant from the Governor, pay all the expenses and salary of every character as due and provided herein. Such sum or sums as may be left after such salaries and supervisory expenses have been paid, as may remain unexpended on the first day of January each year, shall be paid to the State Highway Department for use in maintenance and repair of the highways, as in the discretion of the Highway Board may be directed. Acts 1929, p. 300, § 17.

§ 1770(60vv). Daily records of motor carriers.—(a) Motor carriers shall keep daily records upon forms prescribed by the commission of all motor-vehicles and trailers used during the current month. On or before the tenth of the month following, they shall file under oath with the commission, upon forms prescribed by the commission, summaries of their daily records, which will show the capacity of their motor-vehicles and trailers and the miles operated by each motor-vehicle and trailer during the preceding month, together with such other information as the commission may require. Such daily records shall be filed and preserved by the commission for a period of at least two years. Acts 1929, p. 301, § 18.

§ 1770(60ww). Licensed motor carrier not to

be taxed by county or municipality.—No county, municipal, or other political subdivision of this State shall impose any registration, license, or operating fee or tax of any kind on any motor carrier licensed under this Act; and this shall be the only license or operating tax imposed upon any motor carrier by this State. Acts 1929, p. 301, § 19.

§ 1770(60xx). Violation of act, a misdemeanor. Rebates and free transportation; penalty. — (a) Every officer, agent, or employee of any corporation and every other person who violates or fails to comply with the provisions of this Act (except the provisions relating to the payment of fees or taxes), or any order, rule, or regulation of the commission, or who procures, aids, or abets therein, is guilty of a misdemeanor, and upon conviction shall be punished as for a misdemeanor.

(b) Every officer, agent, or employee of any corporation and every other person who knowingly accepts or receives any rebate or drawback from the rates, fares, or charges established or approved by the commission for motor-carriers, or who procures, aids, or abets therein, or who uses or accepts from a motor carrier any free pass or free transportation not authorized or permitted by law or by the orders, rules, or regulations of the Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor, and upon conviction shall be punished as for a misdemeanor. Acts 1929, p. 301, § 20.

§ 1770(60yy). Authority to employ and fix salaries.—The commission is hereby authorized to employ such persons as may be necessary, in the discretion of the commission, for the proper enforcement of the provisions of this Act, the salaries for such employees to be fixed by the commission. The traveling expenses of the commission and its employees incurred in the performance of this Act shall be paid as similar expenses of the commission. Acts 1929, p. 302, § 21.

§ 1770(60zz). Act cumulative of other laws.—This Act shall be cumulative to other laws regulating the use of motor-vehicles on the highways. Acts 1929, p. 302, § 22.

§ 1770(60aaa). Act effective October 1, 1929.—This Act shall become operative and effective on October 1st, 1929. Acts 1929, p. 302, § 24.

ARTICLE 4

Title Registration Act

§ 1770(60½a). Machines operated for hire. — Every owner of a motor-vehicle who operates the same for hire, either for hauling passengers or freight, whether a resident or non-resident of this State, shall register the same with the commissioner of motor-vehicles of Georgia and obtain a license therefor, and shall pay any and all fees and taxes as may be required by law. Pro-

vided, however, this Act shall not apply to such motor-vehicles from States other than Georgia, where such other States do not require the purchase of such licenses and license-tags by such motor-vehicles owned and operated under Georgia licenses in such other States.

Any person or persons violating the provisions of this Act shall be punished as for a misdemeanor, as provided in section 1065 of Park's Penal Code of Georgia, Volume 6. Acts 1929, p. 293, § 1.

CHAPTER 18

Business of Making Loans

§ 1770(61). Interest rate.

Construed With §§ 2279, 2280.—The superintendent of banks is authorized to issue the license provided by the terms of this section, and to perform all other acts previously devolving upon the State bank examiner under the provisions of sections 2279 and 2280. Although the licensing official in the terms of the act of 1920 was designated as the State bank examiner when in fact no such official existed at the time of the passage of the act, it is manifest that the General Assembly intended to place the class of lenders authorized by the enactment under the supervision of the State banking department as created by the act of 1919, and in giving effect to the legislative intention it follows that the duty of issuing the license provided for must be construed to refer to the superintendent of banks. *Mathis v. Fulton Industrial Corp.*, 168 Ga. 719, 149 S. E. 35.

Rate of Interest.—Although the bill of sale may have been executed as security for a loan of \$300 with interest at the rate of 3½% per month, authorized under the "small-loan act" approved August 17, 1920, p. 215; and even though it be assumed that loans of money made pursuant to the provisions of that act can not be secured by a bill of sale passing title to personalty, and which, therefore, is not a mortgage, the borrower, in setting up exemption of the property from levy by virtue of the homestead and exemption laws, does not attack the validity of the lender's security, but sets up an exemption which he claims supersedes the lender's security, upon the ground that, as contended by the borrower, the instrument securing the lender was a mortgage and not a bill of sale passing title to the property to the lender as security for the debt. *Tarver v. Beneficial Loan Society of Macon*, 39 Ga. App. 646, 148 S. E. 288.

Applied in City Purchasing Co. v. Clough, 38 Ga. App. 53, 54, 142 S. E. 469.

Persons to Whom Applicable.—Even the criminal procedure provided in this act refers only to those who may obtain license and qualify under the provisions of the act. *Bennett v. Bennett*, 161 Ga. 936, 949, 132 S. E. 528. From dissenting opinion.

Penalty for Violation of Section.—This act makes no provision for any penalty for a violation of this section. *Williams v. Yarbrough*, 34 Ga. App. 500, 130 S. E. 361.

Equitable Relief.—There is no provision in this act giving the superintendent of banks the power necessary to the maintenance of a suit seeking relief in equity. The case is controlled by the holding in *Bentley v. Board*, 162 Ga. 836; *Bennett v. Bennett*, 161 Ga. 936, 938, 132 S. E. 528.

The borrower could set up in defense of the action of trover by the lender the grounds of equitable relief that in making the loan the lender did not comply with this act, and that the loan contract was void because the lender collected a greater sum as interest than the statute authorized. *Calhoun v. Davis*, 163 Ga. 760, 137 S. E. 236.

§ 1770(73). Amount of loans; interest.

An agreement in the contract to pay compound interest, or to pay, in addition to the interest contracted for at 3½% per month, the costs of collecting, securing, or attempting to collect or secure the indebtedness evidenced by the contract, in addition to a sum for attorney's fees, is expressly prohibited, and the presence in the contract of an agreement to pay either, by the express provisions of the act renders the contract void and unenforceable,

and the principal and interest and all charges uncollectible. *Fishburne v. Hartsfield Loan, etc., Co.*, 38 Ga. App. 784, 145 S. E. 495.

§ 1770(76). Salary assignments.

Transactions to Which Applicable.—This act nullifies and precludes enforcement of certain loans and salary assignments given to secure the same when made in contravention of its provisions as to special licensing by the State bank examiner and as to rates of interest or discount. *McLamb v. Phillips*, 34 Ga. App. 210, 213, 129 S. E. 570.

Same—Absolute Unconditional Sale of Salary.—This act does not cover a bona fide assignment or sale of wages or salary. *McLamb v. Phillips*, 34 Ga. App. 210, 213, 129 S. E. 570. Citing *Tollison v. George*, 153 Ga. 612 (1), 614, 112 S. E. 896; *Atlanta Joint Terminals v. Walton Discount Co.*, 29 Ga. App. 225, 227, 114 S. E. 908.

Same—Effect upon Sections 3446-3465.—Nothing in this act or in other legislation has apparently either expressly or by implication repealed the law of 1904, §§ 3446-3465, so far as it relates to a business of actual and bona fide buying of wages or salaries. That original act, to this extent, therefore, remains in full force. *McLamb v. Phillips*, 34 Ga. App. 210, 213, 129 S. E. 570.

TWELVE a TITLE

Armistice Day Holiday

§ 1770(81). Holiday, November 11.—From and after the passage of this Act the 11th day of November of each year, commonly known as Armistice Day, is hereby declared a public and legal holiday in the State of Georgia. Acts 1929, p. 211, § 1.

THIRTEENTH TITLE

Regulations for Particular Branches of Trade Agriculture

CHAPTER 1

Inspection

ARTICLE 1

Inspection, Analysis, and Sale of Fertilizers.

SECTION 1

Analysis

§ 1773. (§ 1553). Copy as evidence.

Section held not applicable in *Southern Cotton Oil Co. v. Raines*, 167 Ga. 880, 147 S. E. 77.

§ 1777. Grade not to be lowered; brand name or trade-mark.

Registration Not Required for Each Fiscal Year.—The provisions of the statute embodied in this section and § 1771, do not require the annual registration, for each fiscal year, of each brand of fertilizer sold. *Logan v. Tennessee Chemical Co.*, 166 Ga. 680, 144 S. E. 269.

§§ 1778(a), 1778(b). Park's Code.

See § 1778(1)-1778(2).

§ 1778 (1). Fertilizers must be tagged showing sources and ingredients.

Constitutionality.—"This section is not unconstitutional for any reason assigned. The penalty provided under the police power of the State applies alike to all persons of the same class. Moreover, it is not shown how or in what manner any constitutional guaranty is denied." *Southern Cotton Oil Co. v. Raines*, 167 Ga. 880, 147 S. E. 77.

§ 1778 (2). Vendor liable in damages, when.

Effect of Agreement to Evade Statute.—The penalties under this section can not be avoided by showing an agreement between the parties to evade the statute. *Southern Cotton Oil Co. v. Raines*, 167 Ga. 880, 147 S. E. 77.

SECTION 3

Inspectors, Their Duties and Compensation.

§ 1782. Oath of inspectors.

A State inspector of fertilizers, being appointed by the Commissioner of Agriculture, and being required before entering upon the discharge of his duties to take a special oath to faithfully discharge all duties required of him (this section), such oath is not one required by § 272 to be filed in the Executive office. The oaths required to be so filed are the official oaths referred to in § 269. Under proper construction of § 1780 it impliedly provides for the filing of the oaths of fertilizer inspectors with the Commissioner of Agriculture. *Talmadge v. Cordell*, 167 Ga. 594, 146 S. E. 467.

SECTION 4

Samples

§ 1785. Purchaser may require samples to be taken.

Applied in *Southern Cotton Oil Co. v. Raines*, 167 Ga. 880, 147 S. E. 77.

§ 1790. Legal effect of chemist's statement.

Admissibility of Private Analysis.—Where a recovery of damages and penalty for the sale of fertilizer is sought on the ground that the fertilizer bought was inferior to the representations and brand as registered, and no official analysis is introduced in evidence, or the purported official analysis is not shown to be based upon samples obtained and furnished as provided by law, an analysis made by a private chemist would be admissible if offered by either party. A private analysis would not be admissible where there is in evidence an official analysis as provided in this section. *Southern Cotton Oil Co. v. Raines*, 167 Ga. 880, 147 S. E. 77.

"The plaintiff in error cites, as authority for the admissibility generally of a private analysis, *Patterson v. Ramspeck*, 81 Ga. 808, 10 S. E. 390, and cit. Those cases were decided prior to the passage of the act of December 27, 1890 (Ga. L. 1890-91, vol. 1, p. 142, sec. VI. Civil Code 1910, § 1790); and since the passage of that act those cases are not authority. Compare *Jones v. Cordele Guano Co.*, 94 Ga. 14, 20 S. E. 295; *Southern Cotton Oil Co. v. Raines*, 167 Ga. 880, 147 S. E. 77.

SECTION 7A

Supplemental Act

§ 1799(1). **Supplemental act.**—The following sections are in addition to and supplemental to all the present laws governing the sale, manufacture and distribution of fertilizer and fertilizer materials in the State of Georgia: Acts 1929, p. 228, § 1.

§ 1799(2). **Registration of brands; analysis; fee.**—Every manufacturer and mixer selling or offering for sale within the State any fertilizer or fertilizer material shall first file annually with the Commissioner of agriculture, upon forms supplied by the commissioner for that purpose, a registration of each brand of fertilizer or fertilizer material to be offered for sale, giving the name and address of the manufacturer or mixer, together with the name of each place at which they may desire to do business in this State, the guaranteed analysis thereof, stating the sources from which the phosphoric acid, nitrogen and potash are derived and giving the percentage of organic nitrogen, the percentage of inorganic nitrogen and the percentage of the total amount of nitrogen, and stating what proportion of the potash is sulphate, if any, and that for the purpose of this Act, organic nitrogen shall be that derived from animal or vegetable matter, and all other nitrogen shall be classed as inorganic. Such application to be accompanied by a fee of five dollars for each brand of fertilizer or fertilizer material which they may desire to sell. Acts 1929, p. 228, § 1.

§ 1799(3). **License for sales, etc., fee \$1.** — Every person, before offering any fertilizer or fertilizer material for sale or exchange in the State of Georgia, shall first procure a license from the Commissioner of Agriculture authorizing such person to sell or exchange or deal therein. Such license shall be issued by said Commissioner of Agriculture on payment of fee of \$1.00, and shall expire on the 31st day of December of each year. Acts 1929, p. 229, § 2.

§ 1799(4). **Filler.**—It shall be unlawful for any manufacturer or mixer of commercial fertilizer to use any material as a filler or make-weight which does not comply with the requirements of this law as hereinafter set out as a fertilizer material. Acts 1929, p. 229, § 3.

§ 1799(5). **Tag.** — Every bag or package of commercial fertilizer sold within the State shall have printed on bag or package, or affixed thereto, a tag containing a legible and plainly printed statement in the English language, the following:

1. Net weight of each bag or package, in pounds.
2. Brand name or trade mark.
3. (a) Guaranteed analysis, giving the minimum percentage of available phosphoric acid, and the sources, and within ten per cent. of the amount of each source of available phosphoric acid.
- (b) The minimum percentage of total nitrogen

and the names of the sources, and within ten per cent. of the total amount of the source in the form of organic materials, and the names of sources, and within ten per cent. of the total amount of the source in the form of organic materials.

(c) The minimum percentage of potash and the sources, and within ten per cent. of the amount of each source of potash.

(d) The sources, and pounds of filler.

(e) Total pounds of available plant food.

(f) Name and address of manufacturer, mixer, or importer.

(g) Whenever any fertilizer material is reduced from its original plant-food content, the amount of the filler and sources used must also be shown as provided for above.

(h) It shall further be unlawful for any fertilizer manufacturer or mixer to use any foreign or artificial coloring in the manufacture, mixture, or manipulation of any fertilizer or fertilizer material, or to use any substance for supplying an odor not natural to and a part of the material used. Acts 1929, p. 229, § 4.

§ 1799(6). Tankage.—It shall be unlawful to sell or offer for sale any fertilizer material as tankage which shall contain more than two per cent. of inorganic nitrogen, and it shall be unlawful to designate as tankage any material used in a mixed goods which contain more than two per cent. of inorganic nitrogen. It shall also be unlawful to designate as tankage any material which contains hair, hoof, horn or other animal matter in which the nitrogen shows available of less than eighty-five per cent. when determined by the neutral permanganate method without a clear statement on the outside of each package of the fact that such material is used. Acts 1929, p. 230, § 5.

§ 1799(7). Penalty for variation from legal percentage of water soluble nitrogen. — Where the present law states the percentage of water soluble nitrogen shall be declared, same shall be in terms of water soluble nitrogen, and a variation of ten per cent. shall be construed as false branding and be subject to a penalty of ten per cent. of purchase-price. Acts 1929, p. 230, § 6.

§ 1799(8). Inspection; Samples. — The Commissioner of Agriculture is authorized to use the inspectors provided for by law in inspecting all factories, warehouses, railroad cars and places of business of all manufacturers and mixers of commercial fertilizer, and is authorized to open any and all packages, cars or parcels of fertilizer or fertilizer material or materials which may be found in and about such places which are unlawful to be used in fertilizer, and to secure samples of the same to be analyzed by the State Chemist as now provided by law. Acts 1929, p. 230, § 7.

§ 1799(9). Inspection before delivery to consumer.—All inspections of commercial fertilizer and fertilizer materials as now provided by law shall be in so far as practicable made before delivery into the possession of the consumer. However, the Commissioner of Agriculture is au-

thorized in his discretion to have samples drawn at any time or place of any fertilizer or fertilizer material found within the limits of this State. Acts 1929, p. 231, § 8.

§ 1799(10). Penalties for shortage in plant food or commercial value.—Any fertilizer or fertilizer material sold in this State without compliance with the requirements of the law, any fertilizer which upon analysis by the State Chemist shows a shortage in any one plant food of ten per cent. or more, and any fertilizer which upon analysis under direction of the State Chemist shows a shortage in commercial value below the guarantee of five per cent. or more shall be subject to a penalty of twenty-five per cent. of the purchase-price plus the actual shortage in commercial value. These penalties shall be in lieu of all other penalties now provided by law and shall not be cumulative. Acts 1929, p. 231, § 9.

§ 1799(11). Attachment, etc., to collect penalty; payment of costs.—Whenever any fertilizer or fertilizer material upon analysis by the State Chemist is found subject to a penalty under the provisions of this law, the Commissioner of Agriculture is empowered and it is hereby made mandatory upon him, to proceed by attachment or other legal means to collect such penalty from the party or parties subject thereto and to pay the same to the person or persons entitled to receive it. Provided that such adjustment is not made after sixty days from notice of deficiency from Commissioner of Agriculture; and provided further that the matter is not being contested in the court or courts, in which event the powers of the commissioner shall be suspended until final determination of the matter by the courts. Any cost accruing under the enforcement of these provisions may be paid by the Commissioner of Agriculture out of the funds derived from their fertilizer-inspection fees. In any suit filed by the commissioner under this Act legal service may be had on any agent or representative in this State of any non-resident manufacturer or mixer. Acts 1929, p. 231, § 10.

§ 1799(12). Cancellation of registration, etc. — If any manufacturer or mixer shall be subject to a penalty under the terms of this law and shall fail or refuse to pay the same upon demand as provided in the preceding section, the Commissioner of Agriculture is authorized to cancel the registration or registrations of such manufacturer or mixer and to forbid the sale by such manufacturer or mixer of any fertilizer or fertilizer materials in this State until such penalty or penalties have been paid, or final judgment has been obtained. Acts 1929, p. 232, § 11.

§ 1799(13). Violation of law, a misdemeanor.—Every manufacturer, mixer, jobber, or dealer violating any of the provisions of this Act or the fertilizer laws of this State shall be guilty of a misdemeanor, and punished as provided by section 1065 of the Penal Code of 1910. Acts 1929, p. 232, § 12.

§ 1799(14). Laws not repealed by this Act.—

None of the present laws regulating the sale, distribution and inspection of fertilizers in this State are repealed except such as are in conflict with the laws of this Act, but that this Act is intended to be an enlargement upon and in addition thereto, and is to become effective January 1st, 1930. Acts 1929, p. 232, § 1.

§ 1799(15). Fees covered into State Treasury.—All fees received by the Commissioner of Agriculture under the terms of this Act shall be covered into the State Treasury. Acts 1929, p. 232, § 14.

ARTICLE 2

Inspection of Oils

§§ 1800 to 1814. Repealed by the Acts of 1927 pp. 279, herein codified as §§ 1814(4) et seq.

§§ 1814(d)-1814(aa). Park's Code.

See §§ 1814(4)-1814(26).

§ 1814(4). "Gasoline," "kerosene," defined.—The word "gasoline" used in this Act shall embrace and include gasoline, naptha, benzol, and other products of petroleum under whatever name designated, used for heating or power purposes. The word "kerosene" shall embrace and include kerosene and other products of petroleum under whatever name designated, used for illuminating, heating, or cooking purposes. Acts 1927, p. 279.

§ 1814(5). Inspection of gasoline and kerosene.—For the purpose of the Act all gasoline and kerosene sold, offered or exposed for sale in this State, shall be subject to inspection and analysis as hereinafter provided. All manufacturers, refiners, wholesalers, and jobbers, before selling or offering for sale in this State any gasoline or kerosene, or the like products, under whatever name designated, for power, illuminating, heating, or cooking purposes, shall file with the Comptroller-General a declaration or statement that they desire to sell such products in this State, and shall furnish the name, brand, or trademark of the products which they desire to sell, together with the name and address of the manufacturer thereof, and that all such products are in conformity with the distillation test hereinafter provided.

§ 1814(6). Approval by State Oil Chemist and Comptroller-General.—All materials, fluids, or substances offered or exposed for sale, purporting to be substitutes for, or motor-fuel improvers, or other motor fuels to be used for power, cooking, or heating purposes, shall, before being sold, exposed, or offered for sale in this State, be submitted to the Comptroller-General for examination and inspection, and shall receive the approval of the state Oil Chemist hereinafter provided for, and the Comptroller-General, and then shall be sold or offered for sale only when properly labeled with a label, the form and contents of which has

been approved by the State Oil Chemist and Comptroller-General.

§ 1814(7). Illegal sale; confiscation.—The sale or offering for sale of all such gasoline and kerosene as hereinbefore enumerated and designated, used or intended to be used for power, illuminating, cooking, or heating purposes, when sold under whatever name, which shall fall below the standard hereinafter provided, is hereby declared to be illegal, and same shall be subject to confiscation and destruction by order of the Comptroller-General.

§ 1814(8). Containers and labels.—Every person, firm, corporation, or association of persons, delivering at wholesale or retail any gasoline in this State, shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "gasoline," plainly stenciled or labeled in vermilion red, in English. Such dealers shall not deliver "kerosene oil" in any barrel, cask, can, or other container which has been stenciled or labeled, that has ever contained gasoline, unless such barrel, cask, can, or other container shall have been thoroughly cleaned and all traces of gasoline removed. Every purchaser of gasoline for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as heretofore provided; every person delivering at wholesale or retail any "kerosene" in this State shall deliver same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "kerosene" in English, plainly stenciled or labeled in vermilion red, and every person purchasing for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as heretofore provided. Nothing in this section shall prohibit the delivery of gasoline by hose or pipe from a tank directly into the tank of any automobile or other motor. In cases where gasoline or kerosene is sold in bottles, cans, or other containers of not more than one gallon, for cleaning and other similar purposes, such bottles, cans, or other containers shall bear label with the words, "unsafe when exposed to heat or fire."

§ 1814(9). Notice as to shipments; samples.—When gasoline or kerosene is shipped into the State of Georgia in any manner whatever, the manufacturer, refiner, or jobber shall promptly give notice to the Comptroller-General of the date of shipment, and shall furnish a sample of not less than eight ounces of the gasoline or kerosene shipped and labeled, giving the tank-car number, truck number or other container number, with the name and address of the person, company, firm, or corporation and to whom it is sent, and the number of gallons contained in the shipment made. In each instance where gasoline or kerosene is shipped in tank-cars, the record of the tank-car furnished by the railroad companies as to the capacity of each tank-car will be accepted.

§ 1814(10). Test or analysis for buyer.—Any person purchasing any gasoline, illuminating, or heating oils, from any manufacturer, refiner, job-

ber, or vendor in this State, for his own use, may submit fair samples of said gasoline, illuminating, or heating oils to the Comptroller-General to be tested, or analyzed by the State Oil Chemist. In order to protect the manufacturer or vendor from the submission of spurious samples, the person selecting the same shall do so in the presence of two or more disinterested persons, which samples shall not be less than one pint in quantity, and bottled, corked, and sealed in the presence of said witnesses, and sample shall be placed in the hands of a disinterested person, who shall forward the same at the expense of the purchaser to the Comptroller-General; and upon the receipt by him of any such sample he is hereby required to have the State Oil Chemist to promptly test and analyze the same, and he shall return to such purchaser or purchasers a certificate of analysis, which, when verified by the affidavit of the State Oil Chemist, shall be competent evidence in any court of law or equity in this State.

§ 1814(11). Sale without test; misdemeanor.—It shall be a misdemeanor for any manufacturer, refiner, vendor, jobber, or wholesaler to sell, expose, or offer for sale any gasoline for heating or power purposes in this State, which does not comply with the following distillation test:

1. Corrosion test. A clean copper strip shall not be discolored when submerged in the gasoline for 3 hours at 122° F.

2. Distillation range. When the first drop falls from end of the condenser, the thermometer shall not read more than 55° C. (131° F.)

When 20 per cent. has been recovered in the receiver, the thermometer shall not read more than 105° C. (221° F.)

When 50 per cent. has been recovered in the receiver, the thermometer shall not read more than 140° C. (284° F.)

When 90 per cent. has been recovered in the receiver, the thermometer shall not read more than 200° C. (392° F.)

The end point shall not be higher than 225° C. (437° F.)

At least 95 per cent. shall be recovered as distillate in the receiver from the distillation.

3. Sulphur. Sulphur shall not be over 0.10 per cent.

All the foregoing tests shall be made in accordance with the methods for testing gasoline contained in Technical Paper 323A, United States Government Bureau of Mines, Department of the Interior.

It shall also be a misdemeanor for any manufacturer, jobber, wholesaler, or vendor to sell, offer, or expose for sale any kerosene oil for use or intended to be used for heating, cooking, or power purposes, which does not comply fully with the following distillation test:

1. Color. The color shall not be darker than No. 16 Saybolt.

2. Flash point. The flash point shall not be lower than 100° F.

3. Sulphur. The sulphur shall not be more than 0.125%.

4. Flock. The flock test shall be negative.

5. Distillation. The end point shall not be higher than 625° F.

6. Cloud point. The oil shall not show a cloud at 5° F.

7. Burning test. The oil shall burn freely and steadily for 16 hours, in a lamp fitted with a No. 2 hinge burner.

All of the foregoing tests for kerosene shall be made according to the methods for testing kerosene contained in Technical Paper 323A, United States Government Bureau of Mines, Department of the Interior.

Provided, that the Comptroller-General may from time to time change these specifications to agree with those adopted and promulgated by the United States Government Bureau of Mines; provided further, that sixty days' notice shall be given all manufacturers, refiners, and jobbers doing business in this State, before any such changes shall become effective.

§ 1814(12). State Oil Chemist; appointment, duties, salary.—The Comptroller-General is hereby required to appoint a chemist who shall be an expert oil analyst, and to be designated as the State Oil Chemist, whose duty it shall be to analyze all samples of gasoline and kerosene, and all fluids purporting to be substitutes for, or motor-fuel improvers, or other like products of petroleum, under whatever name is designated, and used for illuminating, heating, cooking, or power purposes, submitted by the Comptroller-General or any duly authorized inspector or inspectors. Said chemist shall hold office for a period of four years, unless sooner removed for cause, as hereinafter provided; and he shall receive a salary of \$3,000.00 per annum, payable monthly.

§ 1814(13). Oil inspectors; number, appointment, term, salary, expenses.—The offices of general oil inspectors, State oil inspectors, and of all local oil inspectors are hereby abolished, and it shall be the duty of the Comptroller-General to appoint six oil inspectors, each of whom shall receive a salary of \$2,400.00 per annum, and shall be allowed an expense account not to exceed the sum of \$2,400.00 each per annum, payable monthly. The inspectors herein provided for shall hold office for four years, unless sooner removed for cause, as hereinafter provided.

§ 1814(14). Unlawful interest in sale, etc.—Any chemist or inspector who, while in office, shall be interested directly or indirectly in the manufacture or vending of any gasoline shall be guilty of a misdemeanor.

§ 1814(15). Inspectors' automobiles; daily reports.—All inspectors are hereby required to provide themselves, at their own expense, with automobiles equipped with accurate speedometers, and to make daily reports to the Comptroller-General, covering all work performed, and monthly reports shall also be made, showing the following information:

1. Name and number of towns visited.
2. Number of inspections in each town.
3. Number of miles traveled by rail.
4. Number of miles traveled by automobile.
5. Expenses incurred, with vouchers showing

the amount spent for hotel bills, gasoline, oil, railroad fares, and incidentals necessary in the performance of their duties.

6. Number of samples drawn, each kind.

7. Number pumps inspected, and the numbers of the pumps.

8. Number pumps condemned.

9. Number of pumps in territory.

§ 1814(16). Duty to collect and test samples.—

The Comptroller-General is hereby empowered and it is made his duty to collect, or cause to be collected by his duly authorized inspectors, samples of gasoline, kerosene, or other illuminating cooking, or heating oils sold, offered, or exposed for sale in this State, and to cause samples to be tested or analyzed by the State Oil Chemist hereinbefore provided for, for this purpose. And said State Oil Chemist is hereby required to report his finding to the Comptroller-General, together with a certificate of analysis of such gasoline, kerosene, or other like products of petroleum, under whatever name designated, and used for illuminating, heating, cooking, or power purposes. Such certificate of analysis, when properly verified by an affidavit of said State Oil Chemist, shall be competent evidence in any court of law or equity in this State.

§ 1814(17). Registration of gasoline dealers.—

Each and every dealer in gasoline, before selling, exposing, or offering for sale any gasoline in this State, and annually thereafter, shall be required to register and shall make known his desire to sell gasoline to the Comptroller-General, giving the name and manner and kind of pump or pumps he will use, and location of same, and keep said certificate or certificates of registration posted in a prominent and accessible place in his place of business where such gasoline is sold. The form of such certificate shall be designated and issued by the Comptroller-General.

§ 1814(18). Inspector's duty as to pumps.—

It shall be the duty of the inspectors herein provided for to familiarize themselves with the accuracy and adjusting devices on the various makes of self-measuring pumps in use in this State; they shall carefully inspect all of such pumps located in the territory assigned to them, at least once every ninety days; all such pumps found to be giving accurate measure with a variation of not exceeding four ounces from the actual measures on a measure of five gallons, he shall place a lead and wire seal, to be provided by the Comptroller-General, on the adjusting device or devices in such way that the adjustment cannot be altered without breaking the seal. Any pump that is found to be giving inaccurate measure in excess of four ounces, the inspector shall then and there notify the operator of the pump, whether owner or lessee, to make the necessary adjustments, the inspector to lend his assistance with the standard measure provided for testing such pumps; after the adjustments have been made, the adjusting devices are to be sealed in the same manner as provided for those pumps found originally accurate. On all pumps that have apparently been altered for the purpose of giving short measure

in excess of eight ounces on a measure of five gallons, or that cannot be adjusted within a range of eight ounces, either over or under, on a measure of five gallons, the inspector shall notify the operator of such pump, whether he be owner or lessee, that it must be immediately adjusted, the inspector to lend his assistance with the standard measure for testing such pumps. Should the operator fail or refuse to then and there make such adjustments as are necessary to bring the measure within the allowed variation, the same shall be condemned and dismantled immediately by the inspector examining the same and such pump shall not again be allowed operated in this State without the written consent of the Comptroller-General. Inspectors shall be required to report to the Comptroller-General immediately the name and number of all pumps condemned and dismantled. Any person, company, firm, or corporation who shall reinstall and operate any pump, without the written consent of the Comptroller-General, which has been condemned by a duly authorized inspector herein provided, because of giving short measure in excess of eight ounces to a measurement of five gallons, shall be deemed guilty of a misdemeanor, and upon conviction be punished as prescribed by section 1065 of the Penal Code of Georgia of 1910. When any pump is condemned under the provisions of this Act by any inspector, it shall be the duty of the inspector to immediately make affidavit, before the ordinary of the county in which the pump is located, that the said pump is being operated by the person who shall be named in the affidavit, contrary to law; and thereupon the ordinary shall issue an order to the person named in the affidavit to show cause before him on the day named in the order not more than ten days nor less than three days from the issuance of the order, why the said pump should not be confiscated and dismantled. On the day named in the order, it shall be the duty of the said ordinary to hear the respective parties and to determine whether or not the pump has been operated contrary to the provisions of this Act; and if the said ordinary shall find that the said pump has been so operated, then he shall forthwith issue an order adjudging the pump to be forfeited and confiscated to the State of Georgia, and direct the sheriff of the county to dismantle the said pump and take same into his possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the pump to the highest bidder for cash; the proceeds to said sale, or as much therefor as is necessary, shall be used by the sheriff, first, to pay the cost, which shall be the same as in cases of attachment, and thereupon pay over and deliver the residue, if any there be, to the person from whose possession the pump shall have been taken. On and after the passage of this Act, it shall be unlawful for any self-measuring pump, which can be secretly manipulated in such manner as to give short measure, to be installed or operated in this State. Any person, company, firm, or corporation who shall install or operate a self-measuring pump in this State which has a device or other mechanical means used for the purpose of giving short measure, shall, upon con-

viction thereof, be punished as provided in section 1065 of the Penal Code of Georgia of 1910, and such inaccurate self-measuring pump shall be condemned as heretofore provided in this section, and thereafter it shall be unlawful for any person to sell any kerosene, or gasoline from such pump until such pump shall have been made or altered so as to comply with the provisions of this Act, and shall have been inspected and approved for service by an inspector. After the passage of this Act it shall be unlawful for any one to break a seal applied by an inspector to a pump, without first securing consent of the Comptroller-General, which consent may be given through one of the duly authorized inspectors.

§ 1814(19). Access for inspection.—In the performance of their duties, the Comptroller-General, or any of his duly authorized agents, shall have free access at all reasonable hours to any store, warehouse, factory, storage house, or railway depot, where oils are kept or otherwise stored, for the purpose of examination or inspection and drawing samples. If such access be refused by the owner, agent of such premises or other persons occupying and using the same, the Comptroller-General, or his duly authorized inspectors or agents, may apply for a search warrant, which shall be obtained in the same manner as provided for obtaining search warrants in other cases. Their refusal to admit an inspector to any of the above-mentioned premises during reasonable hours shall be construed as prima facie evidence of a violation of this Act.

§ 1814(20). Violation of Act or of rule; penalty. — Any person, or association of persons, firm, or corporation, who shall violate any of the provisions of this Act, or any rule or regulation promulgated by the Comptroller-General for the enforcement of this Act, shall upon conviction thereof be punished as for a misdemeanor, as prescribed in section 1065, of Penal Code of Georgia of 1910.

§ 1814(21). Removal of chemist or inspector; charges in writing.—The State Oil Chemist, or oil inspectors provided for herein, may be removed or discharged for misfeasance or malfeasance in office, incompetency, or other good cause, by a majority vote of the Governor of the State the Attorney-General, and Comptroller-General, after the preferment of charges in writing served on any one of said officials not less than ten days prior to the date which may be set by said Comptroller-General, Governor, and Attorney-General, or a majority of them. Charges may be preferred by any one of the three last-named officials, or any citizen of the State, and from the decision of said officials or majority of them, there shall be no appeal.

§ 1814(22). Expense of equipment, supplies, clerical help, etc., allowance for; limits.—In addition to the salary and expenses of inspectors as provided in section 1814(13) there shall be allowed such further sums for the purchase of equipment, supplies, and clerical help, and to pay any other of the expenses incident to and neces-

sary for the enforcement of this Act, as may hereafter be appropriated; but the total of such expenses shall not exceed the sum of \$20,000.00 annually; so that including all salaries as herein provided, and for the enforcement of said Act, the total appropriation shall not exceed the sum of \$51,800.00. The Comptroller-General is hereby constituted as chief Oil Inspector of this State, for the purpose of the enforcement of this Act, and his salary therefor is hereby fixed at the sum of twelve hundred dollars (\$1,200.00) per annum, to be paid out of the aforesaid total sum of \$51,800.00.

§ 1814(23). Salaries and expense accounts; how paid.—The salaries of the State Oil Chemist and of the inspectors and all of the expenses herein provided for shall be paid out of the treasury on warrants signed by the Governor, by requisition of the Comptroller-General, accompanied by itemized statements and vouchers for said salaries and expenses. The expense accounts of said oil inspectors shall be verified under oath and furnished by said Comptroller-General along with the requisitions.

§ 1814(24). Entire time of chemist and inspectors to be given to duties; bonds.—The State Oil Chemist and the six oil inspectors herein provided for shall devote their entire time to the duties of their respective offices; and each shall give bond, with some good and solvent surety company and in such sum as may be approved by the Comptroller-General, for the faithful discharge of the duties of their respective offices; the premiums on which shall be paid out of the expense fund of \$20,000.00 in this Act provided for.

§ 1814(25). No inspection fees. — No inspection fees of any kind or character shall hereafter be paid for the inspection of gasoline or kerosene.

§ 1814(26). Vacancies in offices.—The Comptroller-General shall be and is hereby authorized to fill any vacancies which may occur in the offices of State Oil Chemist and Oil Inspector, on account of death, resignation, or other cause.

CHAPTER 3

Regulations of Agriculture, etc.

ARTICLE 1

Cotton, Rice, etc.

§ 1844. (§ 1601). Scalesmen, weighers of cotton, and others to be sworn.

Admissibility of Testimony of Unsworn Scalesman.—The testimony of a scalesman as to the weight of a commodity sold by him is not rendered inadmissible because he has not subscribed to the oath required of him as a scalesman of such a commodity under this section. *Buckeye Cotton-Oil Co. v. Murphy & Sons*, 34 Ga. App. 363, 129 S. E. 553.

§ 1851. (§ 1608.) Produce not taxable by cities or towns.

Mineral water is not a farm product within the meaning of this section. *Pratt v. Macon*, 35 Ga. App. 583, 134 S. E. 191.

§§ 1885(c)-1885(h). Park's Code.

See §§ 2119(9)-2119(15).

CHAPTER 5

Peddling

§ 1888. (§ 1642.) Disabled soldiers to peddle without a license.

Editor's Note.—Acts 1929, p. 323, amended the caption of the act of 1919, p. 90, amending this section, by inserting after the words "indigent soldiers," the words "Spanish-American War."

Exemption Not Based on Certificate.—The right of a disabled or indigent soldier of the late European war to conduct business in a town or city without paying license for the privilege of so doing is based upon the fact that the owner of the business is such soldier, and not on the certificate of the ordinary, which is intended to furnish sufficient proof of said fact, and not as a condition precedent to the exercise of the right. *Coxwell v. Goddard*, 119 Ga. 369, 46 S. E. 412; *Fairburn v. Edmondson*, 162 Ga. 386, 134 S. E. 51; *Jones v. Macon*, 36 Ga. App. 97, 98, 135 S. E. 517.

Indigency of Disability — When Cause of Exemption Ceases.—There is nothing in this section which provides for exemption after the indigency or cause of exemption ceases to exist. The act provides that the said certificate, stating the fact of his being [not having been in the past] such indigent soldier shall constitute sufficient proof. *Jones v. Macon*, 36 Ga. App. 97, 98, 135 S. E. 517.

Cannot Certify to Permanent Indigency.—While the ordinary might be able to certify to a patent, permanent physical disability, he necessarily could not certify that a person would always be indigent. *Jones v. Macon*, 36 Ga. App. 97, 98, 135 S. E. 517.

When Tax Is Due Prior to Issuance of Certificate.—The fact that the license tax had become due before the certificate had been issued does not render such soldier liable therefor, if in fact he was a disabled or indigent soldier of said war and a resident of this state at the time the license tax was imposed, especially where he had applied for such certificate before the license tax had become due. *Fairburn v. Edmondson*, 162 Ga. 386, 134 S. E. 51.

Soldier's License Used to Avoid Tax.—Where it was found that the defendant was running a business himself, deriving the profits from it, and was merely attempting to use a soldier's license, granted to a Confederate soldier, as a shield to protect him from paying a license tax to the City of Atlanta and the State, the action of the judge of the superior court in refusing to sanction a certiorari was sustained. *Lacy v. Atlanta*, 34 Ga. App. 453, 454, 130 S. E. 74.

Applies to Indigent Sailors.—In view of the purposes of the amendment of this section, the provision for the exemption of "soldiers" should be so construed as to include a disabled or indigent sailor serving as a gunner in the navy of the United States during the late European War. *City of Macon v. Samples*, 167 Ga. 150, 145 S. E. 57.

Does Not Affect Tobacco Tax.—The exemption of war veterans in this section does not include exemption from the State tax on cigars and cigarettes, imposed by § 993-(149) (Ga. L. 1923, pp. 39, 40). *McMath v. State*, 39 Ga. App. 541, 147 S. E. 899.

Carrying on Business before Issue of Certificate.—The exemption from taxation provided this by section as amended, existed from the time of the passage of the statute, and the certificate of the ordinary is the evidence thereof. And the fact that the defendant in error was carrying on the business before the certificate was issued did not interfere with his right to the exemption. *City of Macon v. Samples*, 167 Ga. 150, 145 S. E. 57.

CHAPTER 5B

Real Estate Brokers and Salesmen

§ 1896(5). "Real estate broker" and "real es-

tate salesman" defined; provisions, where inapplicable.—Whenever used in this article, "real estate broker" means any person, firm or corporation, who, for another and for a fee, commission or other valuable consideration, sells, exchanges, buys, rents, or offers or attempts to negotiate a sale, exchange, purchase, or rental, of any estate or interest in real estate, or collects, or offers or attempts to collect rent for the use of real estate. The term shall include any person, firm, or corporation advertising through signs, newspapers or otherwise, as conducting a real estate office or real estate business. Provided, however, this provision shall not be construed to include the sale or subdivision into lots by the bona fide fee-simple holder of any tract or parcel of land.

A "real estate salesman" means a person employed by a licensed real estate broker to sell or offer for sale, to buy or offer to buy, to negotiate the purchase, sale or exchange of real estate, or to lease, rent, or offer to lease, rent or place for rent any real estate for or on behalf of such real estate broker. The term shall include any other than bookkeepers and stenographers employed by any real estate broker, as real estate broker is defined in the preceding paragraph of this section.

The provisions of this Act shall not apply to any person, firm or corporation, who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned by them. Nor shall the provisions of this Act apply to persons, firms, or corporations, not real estate brokers or real estate salesmen, holding a duly executed power of attorney from the owner for the sale, leasing or exchanging of real estate; nor shall said provisions be held to apply to a receiver or trustee in bankruptcy, an administrator, or executor, or trustee, or any person selling real estate under order of court, or pursuant to the terms of a will, mortgage, or deed of trust, or deed to secure a debt. Acts 1925, pp. 325, 326; 1927, p. 307.

Editor's Note.—The last two sentences of the first paragraph and the last sentence of the second paragraph of this section, were added by the amendment of 1927.

The 1927 Act is cumulative to the former law and repeals it only when expressly stated. See § 25 of the Act.

§ 1896(13). Fees for licenses.—The fees for licenses shall be as follows: For a broker's license, the annual fee shall be \$25.00. If the licensee be a corporation, the license issued to it shall entitle one official or representative thereof to engage in the business of a real estate broker within the meaning of this act. For all other officers or representatives of a licensed corporation who shall engage in the business of a real estate broker within the meaning of this, the annual fee shall be \$10.00. If the licensee be a co-partnership, the license issued to it shall entitle one member of said co-partnership to engage in the business of a real estate broker within the meaning of this Act. For every other member of such co-partnership, the annual fee shall be Ten Dollars.

For a salesman's license, the annual fee shall be Five Dollars. All applications for license shall be accompanied by the license fee as herein provided, and all licenses shall expire upon the 31st day of December of each year. All applications made during the year to expire December 31st of said year. The fees required of brokers and salesmen under this act shall be the full annual fee for

all licenses applied for by or before June 30th of any calendar year; and one-half the annual fee for all licenses applied for between July 1st and December 31st of any calendar year. Provided that this section shall not be construed to prevent municipalities from assessing license fees. Acts 1925, pp 325, 332; 1927, p. 308.

Editor's Note.—The annual fee for salesman's license was reduced from ten to five dollars, by the amendment of 1927. The original last sentence which provided that the fee charged shall be prorated on monthly basis, was stricken, and the present last sentence was added, by the same amendment.

§ 1896(14). Investigations; revocations; dishonest dealing.—The commission may, upon its own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any real estate broker or real estate salesman, who shall assume to act in either such capacity within this state, and shall have power to suspend, for a period less than the unexpired portion of the license, or to revoke any license issued under the provisions of this Act at any time, where the licensee in performing or attempting to perform any of the acts mentioned herein be deemed to be guilty of:

(a) Making any substantial misrepresentations.

(b) Making any false promises of a character likely to influence, persuade, or induce, or

(c) Pursuing a continued and flagrant course of misrepresentation or the making of false promises through agents or salesmen or advertising or otherwise, or

(d) Acting for more than one party in a transaction without the knowledge of all parties thereto, or

(e) Representing, or attempting to represent, a real estate broker other than the employer, without the express knowledge and consent of the employer, or

(f) Failure to account for or to remit for any moneys coming into his possession which belongs to others.

(g) Paying a commission, or sharing or participating in a commission for valuable consideration to or with any person operating in any county within the State of Georgia under the jurisdiction of the Georgia Real-Estate Commission, not licensed under the provisions of the Act as amended.

(h) Has demonstrated unworthiness or incompetency to act as real estate broker or salesman in such manner as to safeguard the interest of the public.

(i) Any other conduct whether of the same or a different character than heretofore specified, which constitutes dishonest dealing.

This act shall not be construed to relieve any person from civil liability or criminal prosecution under the general laws of this state. Acts 1925, pp. 325, 332. Acts 1929, p. 319, § 32.

§ 1896(22). Amendments to Acts as to real-estate brokers.—Sections 1896(4) to 1896(21) of the Code of 1926, defining, regulating, and licensing real estate brokers and real estate salesmen in counties having a population of 44,195 or more, as amended by Act of 1927 is amended by adding thereto this and the following sections. Acts 1929, p. 318, § 28.

§ 1896(23). Definition of "real-estate broker" enlarged.—The term "real-estate broker," in addition to the persons set forth in section 1896(5) shall include the following: Any person, firm, or corporation subdividing a tract of land into twenty (20) or more lots, or offering for sale a tract of land already subdivided into twenty (20) or more lots, where such persons, firm, or corporations sells or offers any of said lots for sale through salesmen, whether such salesmen be regularly or occasionally employed, and whether they be paid salaries or commissions. Acts 1929, p. 318, § 29.

§ 1896(24). Claims not enforceable by unlicensed broker.—No person, firm, or corporation shall have the right to enforce in any court of this State any claim for commissions, profits, option profits, or fees for any business done as real-estate broker or salesman, without having previously obtained the license required under the terms of this Act as amended. Acts 1929, p. 319, § 30.

§ 1896(25). Real-Estate Commission's power to make rules.—The Georgia Real-Estate Commission shall have full power to make all rules and regulations necessary, in its discretion, to carry out the provisions of this Act as amended. Acts 1929, p. 319, § 31.

§ 1896(26). Appeals from decision of Real-Estate Commission.—Be it further enacted by the authority aforesaid, that an appeal from the decision of the Real-Estate Commission, as provided in section 1896(17), shall first be filed with the Real-Estate Commission and then entered to the superior court of the county of the residence of the person, firm, or corporation entering the appeal, within thirty days from the date of the decision of the Real-Estate Commission. The original papers in a case thus appealed shall be transmitted to the clerk of the superior court by the secretary of the Real-Estate Commission. The appeal shall be tried by a jury in the superior court under the same rules and laws as appeals from inferior courts to superior courts are now tried, and in every respect shall be de novo. The decision of the Real-Estate Commission shall become effective immediately on its rendition, unless an appeal is filed and a stay of execution granted by the superior court. Acts 1929, p. 317, § 33.

§ 1896(27). Hearing before Real-Estate Commission.—In the preparation and conduct of hearings before the Georgia Real-Estate Commission, any member of the commission may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. Any party to any hearing before the commission shall have a right to the attendance of witnesses in his behalf at such hearing upon making a request thereof to the commission and designating the person or persons sought to be subpoenaed. In case of disobedience to a subpoena, any member of the commission may invoke the aid of the superior court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of papers; and such court may issue an order requiring the persons to appear be-

fore the commission and give evidence or to produce papers as the case may be; and any failure to obey such order of the court may be punished by the court as a contempt thereof. Testimony may be taken as in civil cases, and any person may be compelled to appear and depose on the same manner as witnesses may be compelled to appear and testify as hereinbefore provided. Any person who shall neglect or refuse to attend and testify or to answer any lawful inquiry or to produce documentary evidence if in his power to do so, in obedience to a subpoena or lawful requirement by such commission or member thereof, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished as prescribed by section 1065 of the Penal Code of Georgia of 1910. Acts 1929, p. 320, § 34.

§ 1896(28). Act cumulative.—This amendment is to be construed as cumulative of said original Act as amended, and does not repeal any of the provisions of said original Act as amended, except as herein specifically stated. Acts 1929, p. 320, § 35.

§ 1896(29). Failure to obtain license, or violation of other provisions of Act, a misdemeanor.—Section 18 of said original Act shall be applicable to this amendment, and all persons who constitute real-estate brokers, or real-estate salesmen as defined by this and former amendment, and who fail to obtain the license required, and all persons who violate any other provisions of this amendment, or the original Act as amended, shall be guilty of a misdemeanor and shall be punished as provided in section 18 of the original Act. Acts 1929, p. 321, § 36.

CHAPTER 9
State Geologist

§ 1963. (§ 1712.) State geologist.
Cited in annotations to Myers v. U. S., 272 U. S. 52, 1249.

CHAPTER 12
Protection of Trademarks, and Names of Benevolent Organizations

§ 1993. Name and style of benevolent and other associations.
Presumption as to Fraud.—If the association or corporation first appropriating and using the name has a clear right to its use, its subsequent use by another corporation knowing of the right is presumed to be fraudulent. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783.
Sufficiency of Proof.—In a case where it is charged that one beneficial incorporated association is using a name which by prior use appertains to another fraternal organization, mere proof by the plaintiff that the defendant was using the name which it had adopted to distinguish it from similar organizations would not entitle the plaintiff to relief. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783.

§ 1994. Injunction against infringement.
Enjoined In Toto.—When it is made to appear that the

name in question is being used, or indeed if it is shown that it can be used, to mislead the public and induce the belief that the association which is using the name which another is justly entitled to use, the defendant should be enjoined from the use of this name in toto, and not merely partially enjoined. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783. The addition of the suffix "incorporated" is not sufficient relief. Id.
Same—Ritual, Passwords, etc. — In Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783, it was further stated that, "It was further error to omit or refuse to enjoin the use by the defendant of the ritual, passwords, signs, tokens, etc., of the national order."

FOURTEENTH TITLE

Inclosures and Stock

CHAPTER 3

Inclosures and Fences

ARTICLE 5

Impounding Animals

§ 2034. (§ 1775.) Impounding animals, how disposed of; and damages, how assessed.

Construed with Section 2082(11)—Quarantining and Dipping.—In Gill v. Cox, 163 Ga. 618, 624, 137 S. E. 40, Mr. Justice Hines speaking for the court, said: "Section [2082- (11)] and [this section] when construed together, furnish the owner of animals impounded under that section an adequate remedy for contesting the amount of expense claimed by the local inspector for quarantining and dipping such animals.
It was the intention of the legislature to make this remedy applicable to an inspector who impounds cattle under section 2082(11). So, if such inspector and the cattle-owner can not agree upon the amount of expense incurred by the inspector in having the animals of the defaulting owner quarantined and dipped, then the inspector must resort to the remedy provided in this section for the recovery of such expense. He can not advertise and sell them without such proceedings. If the cattle-owner wishes to replevy his animals so impounded, and thus lessen the expense of keeping them thereafter impounded, he can give the bond provided for in said section. Gill v. Cox, 163 Ga. 618, 625, 137 S. E. 40.

ARTICLE 6

Election for No Fences

§ 2042(2) Exemption of mountain districts from no-fence or stock law; election as to.—In those several counties of the mountain region of Georgia wherein the consent of the State of Georgia has been given to the United States for the acquisition of land for the establishment of National Forest Reserves, where any area composed of three or more militia districts, in which the United States has acquired a majority of the forest lands, which area is isolated from other stock law or no-fence territory by reason of natural barriers such as mountain ranges, or which is adjacent to non-stock law or fence-law territory, and located in counties which heretofore or may hereafter vote

in favor of county-wide stock law or no-fence law, may be exempted from the operation of the stock law or no-fence law when a majority of the lawful voters of said area vote in favor of the same. Acts 1927, p. 217.

§ 2042(3) Petition of freeholders.—It shall be the duty of the ordinary of the county wherein such area is located, when a petition is filed with him, signed by ten or more of the freeholders of the several militia districts located in said area, to hear and determine said petition; and if he is satisfied that the area described in said petition is so isolated from other stock-law territory or adjacent to non-stock-law territory, then it shall be his duty to call an election, giving notice of the same for twenty days in each of the districts named in said petition, by posting notices at three or more public places, and submit the question of "Fence" or "No fence" for said area to the qualified voters of the area described in said petition, which election shall be held in each district embraced in the area, under the same rules and regulations governing the holding of elections for members of the General Assembly. If a majority of the votes polled in said area at said election are for "Fence," then the same shall become operative and effective in said area ninety days from the date of said election, and said area shall then be exempt from the operation of county-wide stock law. Acts 1927, p. 218.

ARTICLE 7

Miscellaneous Provisions

§ 2043. (§ 1781). Militia districts, fences around.

Stock law not applied to district adjoining another State, when. *Donaldson v. Gilliam*, 39 Ga. App. 504, 147 S. E. 423. Proclamation not conclusive, but prima facie evidence, as to fencing; rebuttal of inference. *Id.*

§§ 2043(a), 2043(b). Park's Code.

See §§ 2042(2)-2042(3).

§ 2044. Stock-law fences legalized.

Resolution by Commissioner Not Conclusive.—If there has been no honest effort made by the citizens of the district to build good fences and gates on or about the district line, and said fences and gates have not in fact been erected, a resolution of the county commissioners declaring that they have inspected the fences and gates so erected, and recognizing and establishing such fences and gates as the boundary fence between the district and adjoining districts and as a legal fence within the purview of this section, is not conclusive that such fence and gates have been erected; and it would be competent for the plaintiff, in a possessory-warrant proceeding brought to recover some of his hogs which had been impounded by a resident of a district under the claim that the district was a no-fence or stock-law district, to show that no fence and gates had been erected on or about the district line. *Parish v. Hendricks*, 163 Ga. 385, 136 S. E. 135. Such a resolution is, however, prima facie evidence of the facts contained therein. *Id.*

§ 2047. (§ 1784.) Gates to be erected.

Proper Gates Are Condition Precedent.—In no event shall the provisions of the stock law go into effect as the results of a militia district election, unless proper gates are so established in public and private roads. *Parish v. Hendricks*,

163 Ga. 385, 136 S. E. 135. See notes of this case under § 2044.

ARTICLE 10

Tuberculosis in Domestic Animals

§ 2064(1). State Veterinarian's duty as to eradication of tuberculosis in animals.—It shall be the duty of the State Veterinarian to eradicate tuberculosis of domestic animals within the State. To enable the State Veterinarian to eradicate bovine tuberculosis effectively, and to aid him in establishing within the State a modified accredited tuberculosis-free area, in conformity with rules and regulations promulgated by the United States Livestock Sanitary Association and adopted by the Bureau of Animal Industry, United States Department of Agriculture, the county commissioners of any county in which the State and Federal Governments jointly engage in a tuberculosis eradication campaign may appropriate for aiding in said work such sums as the county commissioners or board of roads and revenues may deem adequate and necessary. The State Veterinarian shall have full and complete authority and responsibility in all livestock sanitary control work. The State Veterinarian, or his duly authorized agent, is hereby empowered to enter upon any premises, barn, lot, or any other place where cattle are kept, for the purpose of applying test with tuberculin to ascertain whether or not the animals so tested are affected with tuberculosis. The owners, or keeper of such cattle shall render such reasonable assistance as may be required to enable the State Veterinarian or his agent to apply the test with accuracy and dispatch. Acts 1927, p. 349.

§ 2064(2). Notice to owner of animal.—Should the State Veterinarian receive information or have reason to believe that tuberculosis exists in any animal or herds of animals, he shall promptly notify the owner or owners and shall arrange to have such animal or animals tested by a qualified veterinarian. That all cattle which shall hereafter react to a tuberculin test shall immediately after such reaction be branded on the left jaw with the letter "T," said letter to be not less than two inches in length, and in addition said reactors shall be tagged in the left ear with a special tag to be adopted by the State veterinarian. All cattle so identified shall be slaughtered within a period of fourteen days immediately following such reaction, such slaughter to be under the direction of the State Veterinarian in an abattoir where Federal or competent local meat inspection is maintained. The owners of such reactors to the tuberculin test shall be indemnified for such animals, as hereinafter provided.

§ 2064(3). Notice agreement on value.—Before having such reacting animal or animals slaughtered, it shall be the duty of the State Veterinarian to notify the owner of his findings as to the condition of said animal or animals; and if such animal shall have been purchased by the owner not less than six months prior to the examination by said veterinarian, then the owner and said veterina-

rian shall, if possible, agree on the value of such animal or animals so condemned. If said State Veterinarian or his agent and the owner of said animal or animals cannot agree as to the value of said animal or animals, then each will select a citizen from the county in which said animal or animals are located, to act in their place. These two arbitrators shall fix the value of such animal or animals, and in the event said two citizens cannot agree, then the United States Veterinary Inspector in charge of co-operative tuberculosis eradication in Georgia shall act as umpire. In no case shall the value fixed by said owner and State Veterinarian, or by the arbitrators, exceed the amount at which said animal or animals were returned by the owner for taxation to State and County authorities, nor shall the value fixed in the case of a pure-bred cow or bull exceed \$150.00, nor in case of a grade cow or bull the sum of \$90.00. Upon the value being fixed by agreement as hereinbefore provided, said owner shall be paid, within the limitations hereinbefore provided, jointly by the county commissioners out of county appropriations and by the United States Bureau of Animal Industry out of special Federal government tuberculosis eradication funds now available.

§ 2064(4). Restriction of use or sale of tuberculin.—No person, firm, or corporation shall administer veterinary tuberculin, except qualified veterinarians. No person, firm or corporation shall sell, offer for sale or distribution, or keep on hand any veterinary tuberculin, except qualified veterinarians, licensed druggists or others lawfully engaged in the sale of veterinary biological products. "Qualified veterinarians" within the meaning of this Act shall be veterinarians approved by the State Veterinarian and the chief of the United States Bureau of Animal Industry for tuberculin testing cattle intended for interstate shipment.

§ 2064(5). Annual Appropriation.—To enforce the provisions of this Act and to enable the State Veterinarian to eradicate bovine tuberculosis, to establish and maintain a modified accredited tuberculosis-free area, and to develop the livestock industry within the State, the sum of twelve thousand, five hundred (\$12,500) dollars annually, or as much thereof as may be necessary, be and the same is hereby appropriated.

§ 2064(6). Penalty.—Any violation of any provisions of this Act is hereby made a misdemeanor, and shall be punishable by a fine of not less than twenty-five (\$25.00) dollars for each offense.

FIFTEENTH TITLE

Department of Agriculture.

CHAPTER 1.

Commissioner of Agriculture.

§ 2066(a). Park's Code.

See § 2066(1).

§ 2066(1) Terms of commissioner.—Beginning January 1, 1929, the term of office of the Commissioner of Agriculture shall be for a period of two years, or until his successor is elected and qualified. Acts 1927, p. 207.

Editor's Note.—The act of 1927 provides that the term of office of the commissioner shall expire December 31, 1928.

§ 2066(b). Park's Code.

See § 2067(1).

§ 2067(1) Bond of Commissioner.—The Commissioner of Agriculture of the State of Georgia is hereby required to give a bond of fifty thousand (\$50,000) dollars as a guaranty of the faithful performance of the duties of his office, and for the proper accounting for all monies, fees, etc., received by the office, said bond to be furnished by a surety company authorized to do business in Georgia by the laws of this State, provided said premium on said bond, shall be paid by the State of Georgia. Acts 1927, p. 206.

§ 2079. Cattle-ticks—suppression of diseases.

Quoted in Gill v. Cox, 163 Ga. 618, 622, 137 S. E. 40.

§ 2082(b). Park's Code.

See § 2081(2).

§ 2081(2). Duties.

Acceptance of Federal Regulation. — The act from which this section was taken and § 2082(11) amounts to an acceptance of the regulations and methods of the Commissioners of Agriculture of United States under Act Cong. May 29, 1884, section 3 (Comp. St. section 8691). Thornton v. United States, 2 Fed. (2d), 561.

Cited in Gill v. Cox, 163 Ga. 618, 622, 137 S. E. 40.

§ 2081(3). Salary of State Veterinarian. — The salary of said State Veterinarian shall be four thousand two hundred (\$4,200.00) dollars per annum, and he shall in addition be reimbursed his actual traveling expenses, incurred while traveling in the service of the State in the regular discharge of his duties, not to exceed two thousand (\$2,000.00) dollars, and that he is to receive no other salary or remuneration from any other source. Acts 1929, p. 336, § 3.

§ 2082(9). Dipping-vats and chemicals; mandamus.

Applied in Colquitt County v. Bahnsen, 162 Ga. 340, 346, 133 S. E. 871.

§ 2082(10). Inspectors.

Constitutionality—Remedy of Inspector for Expenses. — This section when construed in connection with section 2034, furnishes the only remedy by which the local inspector can prosecute his claim for expenses incurred by dipping and caring for such animals, and in defense of such proceeding by the local inspector the owner had an ample remedy for contesting the amount of expense claimed by the local inspector. This being so, this section is not unconstitutional upon the ground that it denies to the owner of animals so impounded due process of law. Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

The enforcement of this section is not unreasonable so as to be unconstitutional upon the ground that it is a deprivation of due process of law. Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

§ 2082(11). Quarantine and dipping; notice; lien for expenses.

As to this section being an acceptance of the Federal regulations, see note to § 2081(2).

Constitutionality.—Gill v. Cox, 163 Ga. 618, 626, 137 S. E. 40, conforms to the holding set out under this catchline in the Georgia Code of 1926.

Failure of Owner to Pay Expenses after Three Days Notice.—That part of the section which provides that “should the owner fail or refuse to pay said expenses after three days notice,” does not authorize the inspector to sell the animals after advertising them for three days. The purpose of the notice is to afford the owner an opportunity to pay the expense, and avoid the cost of litigation provided in the above section of the Code. If, after the expiration of such three days notice, the owner does not pay this expense, the inspector must proceed as provided in this section. Gill v. Cox, 163 Ga. 618, 625, 137 S. W. 40. See notes of this case under § 2034.

§ 2082(k). Park's Code.

See § 2082(13).

§ 2082(13). Quarantine along border of Florida and Alabama.

Cited in Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

§ 2082(l). Park's Code.

See § 2082(14).

§ 2082(14). When reinfestation eradicated without expense to county.

Entire Expense upon State.—In Colquitt County v. Bahnsen, 162 Ga. 340, 348, 133 S. E. 871, Mr. Justice Hines speaking for the court said: “We think the true meaning of section 2 of the act of 1924 [this section] is to place upon the State the entire expense of eradicating any subsequent reinfestation of a tick-free county.” In support of this holding the court refers to the caption of the Act of 1924, from which this section was taken, and to the fact that an appropriation for the purpose had been made by the Legislature.

Upon a failure of the state veterinarian to perform this duty it will be enforced by mandamus.

The State veterinarian is required to eradicate ticks in reinfested counties without the previous determination of the commissioner of agriculture that such eradication is wise and best. Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

§§ 2084(e)-2084(g). Park's Code.

See §§ 2082(9)-2082(11).

§§ 2084(j)-2084(n). Park's Code.

See §§ 2064(1)-2064(6).

CHAPTER 3.

Foods, Drugs and Liquors, Adulteration or Misbranding Prohibited

ARTICLE 3

Adulteration or Misbranding Prohibited

§ 2101. Adulteration or misbranding prohibited.

The purpose of the law against adulteration or misbranding is to protect consumers from deception or injury, and it is to be conclusively presumed that it was adopted to prevent injury to the public health by the sale and transportation in intrastate commerce of misbranded

and adulterated foods. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904.

Use Not Prohibited.—This section does not prohibit the use of adulterated or misbranded foods. Baltimore Butterine Co. v. Talmadge, (Ga.), 32 Fed. (2d). 904.

When Sale of Substitutes Not Prohibited.—The law does not prohibit the sale of substitutes for creamery butter, provided the substitute is not sold so misbranded as to deceive or so adulterated as to injure. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904, 909.

ARTICLE 4

When an Article Is Adulterated or Misbranded.

§ 2103. Adulterated, when an article is.

The provision of par. 5 of this section is not applicable, where the contention is not that the defendant had adulterated the product by adding some deleterious foreign substance to the normal constituency of the product for the purpose of selling it as a part of the product itself, but where the charge is confined to the negligence of the defendant in allowing the normal ingredients of the product to become putrid and unwholesome. Armour & Co. v. Miller, 39 Ga. App. 228, 147 S. E. 184.

§ 2104. Misbranded.

Use of Distinctive Name of Another Article.—Par. 1, subsec. 1, provides that an article of food shall be deemed misbranded, “if it be an imitation of, or offered for sale under the distinctive name of, another article.” This provision does not require that the name, either in its primary or secondary signification, must describe the contents of the article. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904.

The word “imitation” as used in this section indicates something intentional rather than incidental, and imports more than mere resemblance or similitude. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904.

Articles Sold in Commerce.—This section deals with articles sold in commerce. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904.

That a product is sometimes used as a substitute for creamery butter without being declared to be such would not justify its being banned under this chapter. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904.

“Southern Nut Product” held a “distinctive” name, not an imitation of creamery butter and not adulterated. Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904.

ARTICLE 7

Standards of Purity to Be Fixed

§ 2115. Commissioner to fix standards.

See note to § 2117.

Products made wholly from vegetable oils, water, salt, and harmless coloring matter are not prohibited from being sold by this section. Baltimore Butterine Co. v. Talmadge, (Ga.), 32 Fed. (2d) 904.

ARTICLE 8

When Dealer Is Protected

§ 2117. Prosecutions.

As to jurisdiction of Federal Court to enjoin wrongful confiscation of food products and prosecutions for violating Food and Drugs Act of Georgia, see Baltimore Butterine Co. v. Talmadge (Ga.), 32 Fed. (2d) 904, wherein prayer for relief by injunction held too broad.

ARTICLE 9.

Sanitation of Food Places.

§§ 2119(c)-2119(d). Park's Code.

See § 2119(3).

§ 2119(3). Supervision of state veterinarian over slaughter house, dairies, etc.; report and statistical bulletin.

Slaughter houses are subjects to sanitary regulations. Schoen Bros. v. Pylant, 162 Ga. 565, 571, 134 S. E. 304.

ARTICLE 10.

Apples and Peaches; Grades and Marks.

§ 2119(9). Commissioner of Agriculture to establish grades and marking rules.—The Commissioner of Agriculture is hereby directed to establish and promulgate from time to time official standard grades for all closed packages of peaches and apples, by which the quantity, quality, and size may be determined, and prescribe and promulgate rules and regulations governing the marking which shall be required upon packages of peaches and apples for the purpose of showing the name and address of the producer or packer, the variety, quantity, quality, and size of the product, or any of them; provided that the Commissioner of Agriculture shall establish a grade for immature apples, and an unclassified or similar marking for all peaches and apples not included in the other grades established. Acts 1927, p. 191.

§ 2119(10). Packages to be marked; stamps. — Whenever such standard for the grade or other classifications of peaches or apples under this Act becomes effective, every closed package containing peaches or apples grown and packed for sale or transported for sale by any person, firm, company, or organization shall bear conspicuously upon the outside thereof, in plain words and figures, such marking as are prescribed by the Commissioner of Agriculture under the provisions of this Act.

Every crate or package of peaches or apples shipped by mail or express from any point within this State shall bear an adhesive stamp the price of which shall be one-half of one cent each, showing that they are classified under the provisions of this Act.

Each bill of lading issued for a car of peaches loaded in bushel baskets, shipped from any point within this State, shall bear an adhesive stamp, the price of which shall be \$2.00, showing that the contents of said car is classified under the provisions of this Act.

Each bill of lading for a car of peaches loaded in crates, shipped from any point within this State, shall bear an adhesive stamp, the price of which shall be \$2.50 showing that the contents of said car is classified under the provisions of this Act.

Each bill of lading issued for a car of peaches, loaded in half bushel baskets or in containers of

smaller volume, shipped from any point within this State, shall contain an adhesive stamp, the price of which shall be \$3.00, showing that the contents of said car is classified under the provisions of this Act.

Each bill of lading issued for a carload of apples loaded in bushel baskets or boxes, shipped from any point within this State, shall contain an adhesive stamp, the price of which shall be \$3.00, showing that the contents of said car is classified under the provisions of this Act.

Each bill of lading issued for a carload of apples, shipped from any point within this State, loaded in smaller containers than one bushel, shall bear an adhesive stamp, the price of which shall be \$3.50, showing that the contents of said car is classified under the provisions of this Act. Said stamps shall be sold by the Commissioner of Agriculture to the applicant, and shall be placed on said packages by the shipper, and on the bills of lading by the shipper at the time of the issuance of the same. Acts 1929, p. 306, § 1.

§ 2119(11). Inspection; appointment of inspectors.—The Commissioner of Agriculture of the State of Georgia shall be charged with the enforcement of the provisions of this article, and for that purpose shall have the power: (a) to enter and to inspect personally, or through any authorized agent, every place within the State of Georgia where peaches and apples are produced, packed, or stored for sale, shipped, delivered for shipment, offered for sale, or sold, and to inspect such places and all peaches and apples and containers and equipment found in any such place. (b) to appoint, superintend, control, and discharge such inspectors and subordinate inspectors as in his discretion may be deemed necessary, for the special purpose of enforcing the terms of this Article, to prescribe their duties and fix their compensation. (c) Personally, or through any authorized agent or any such inspector, to forbid the movement of any closed package or packages of peaches or apples found to be in violation of any of the provisions of this Article, which have not been actually accepted by a common carrier for shipment in interstate traffic, and to require the same to be repacked or remarked. A carload of peaches or apples shall not be considered as actually accepted by a common carrier for shipment until the loading is finished, the car sealed, and the bill of lading issued. (d) To cause prosecution to be instituted for violations of this Article.

§ 2119(12). Delivery prima facie evidence of offer to sell.—When peaches or apples in closed packages are delivered to railroad station or a common carrier for shipment, or delivered to a storage house for storage, such delivery shall be prima facie evidence that the peaches or apples are offered or exposed for sale.

§ 2119(13). Penalty.—Any person, firm, company, organization, or corporation, who shall violate any of the provisions of this Article, shall be punishable by a fine of not more than five hundred dollars (\$500.00), or imprisonment for a period not to exceed 90 days, either or both, for each offense.

§ 2119(14). Dealers protected by inspection, etc.—No person, firm, or corporation shall be prosecuted under the provisions of this Article, when he or it can be established that the peaches or apples offered for sale have passed inspection by an authorized inspector of the State of Georgia, and bear the official Georgia State inspection stamp, or by an inspector of the United States Department of Agriculture, and found to be packed and marked in accordance with the requirements of the Commissioner of Agriculture of Georgia.

§ 2119(15). Unfit fruit not to be shipped.—No person in the State of Georgia shall ship any peaches which are immature, or peaches or apples unfit for human consumption; and no apples or peaches shall be offered for sale within the State of Georgia which do not bear on the packages the marks and grades prescribed in section 2119(10).

ARTICLE 10A.

Milk and Cheese Dairy Inspection.

§ 2119(16). Duties of State Veterinarian or his representative as to dairy inspection, etc.—It shall be the duty of the State Veterinarian or authorized representative: (1) to inspect or cause to be inspected as often as may be deemed practicable all creameries, public dairies, condenseries, butter, cheese and ice-cream factories, or any other place where dairy products are produced, manufactured, kept, handled, stored, or sold within the State. (2) To prohibit the production and sale of unclean or unwholesome milk, cream, butter, cheese, ice cream, or other dairy products. (3) To condemn for food purposes all unclean or unwholesome dairy products, wherever he may find them. (4) To take samples anywhere of any dairy product or imitation thereof, and cause the same to be analyzed or satisfactorily tested according to the method of the Association of Official Agricultural Chemists in force at the time. (5) To assist the State Veterinarian in compiling and publishing annually statistics and information concerning all phases of the dairy industry in this State; and the manufacturers of dairy products, upon his request, shall furnish the State Veterinarian such data and statistics as he may require, and these shall be used for the purpose of compiling statistical reports of the general dairy interests. Acts 1929, p. 280, § 1.

§ 2119(17). Definitions of terms used in act.—For the purpose of this Act (1) the term "dairy manufacturing plants" shall be construed to embrace creameries, condenseries, public dairies, butter, cheese, ice cream, and other dairy factories, and the term shall be considered also to mean such concerns as manufacture for sale dairy products, either at wholesale or retail. (2) The term "public dairies" shall also be considered to mean any place where milk and cream are purchased from producers and sold or kept for sale, either at wholesale or retail. (3) The term "milk or cream station" shall be considered

to mean any place where milk or cream may be received or purchased and held for shipment or delivery to a dairy manufacturing plant. (4) The term "milk or cream brokerage" shall be considered to mean any business that is conducted for the purpose of purchasing milk, cream, or butter fat with the intent of resale without being converted into a finished product. (5) The term "field superintendent" shall be considered to mean any qualified person who is the duly authorized representative of any person, firm, company, or corporation engaged in buying, selling, or manufacturing dairy products, and who has supervision over buying stations and operators. (6) The term "cream tester" shall be considered to mean any person who performs the act of sampling or testing milk, cream, or other dairy products, the test of which is to be used as a basis of making payment for said products. Acts 1929, p. 281, § 2.

§ 2119(18). Test of milk, cream, etc.—In determining the value of milk, cream, or other dairy products by the use of the Babcock test, it shall be unlawful to give any false reading or in any way manipulate the test so as to give a higher or lower per cent of butter fat than the milk, cream, or other dairy products actually contain, or to cause any inaccuracy in reading the per cent of butter fat by securing from any quantity of milk, cream, or other dairy products to be tested an inaccurate sample for the test. None other than the Babcock method, or such method of testings as may be approved by the State Veterinarian, may be employed when testing milk or cream, the test of which is to be used as a basis for making payment for the milk or cream thus tested. None other than the Torsion balance scales, or such scales as may be approved by the State Veterinarian, may be used when weighing cream for testing, when such tests are to be used as basis for making payment for such cream. It shall be unlawful to use adjustable scale weights in determining the weight of cream used in the Babcock test. Only such centrifuge shall be used as shall meet the approval of the State Veterinarian. Specifications for apparatus and chemicals and directions for testing milk and cream must conform to those adopted by the American Dairy Science Association, with such additions as are deemed advisable by the State Veterinarian, to make them applicable to the provisions of this Act. All test tubes, bottles, pipettes, burrettes or instruments used in connection with testing or determining the value of milk, cream, or other dairy products by the use of the Babcock test, must be United States Government standard and shall be approved by the State Veterinarian. All milk and cream tests shall be maintained at a temperature of 135 to 140 degrees F. for at least 3 minutes before the reading of the per cent of butter fat is made and recorded. In reading cream tests glymol, or its equivalent, must be used, and the samples under test must be held for 3 minutes in a water bath extending up as high on the graduated neck as the sample itself does. Acts 1929, p. 281, § 3.

§ 2119(19). Licensing of cream testers.—It shall be the duty of the State Veterinarian to

establish a license department for the licensing of a "licensed cream tester," and of testing apparatus for milk and cream. Cream tester's license shall be issued for a period of one year from date of issue, unless previously revoked for cause. Upon expiration of the date of the license all licensed cream testers must again apply for new license, which shall be granted the applicant upon paying the required fee, provided the applicant has not been found guilty of making fraudulent tests, or otherwise violating any of the provisions of this Act, or has permitted his license to lapse for a period of 12 months. It shall be unlawful for any person, firm, or corporation to employ as tester any person who does not have a license to operate testing apparatus for milk and cream. It shall be unlawful for any person operating testing apparatus for milk and cream to fail to have said license posted in a conspicuous place in plain view to all persons entering the room in which all testing is done. The fee for issuing said license shall be five dollars, payable upon presentation of license. The same fee of five dollars shall accompany application for the renewal of license. Acts 1929, p. 282, § 4.

§ 2119(20). State Veterinarian's duty as to weighing and testing.—It shall be the duty of the State Veterinarian and his deputies, and they are hereby authorized, to weigh and test milk, cream, and other dairy products for the purpose of ascertaining the percentage and weight of butter fat or other ingredients contained therein; and if said State Veterinarian or any of his deputies shall find, upon test, that there is a variance of one per cent. or more of butter fat between his test and that made by any person engaged in testing, buying, or selling cream, or .2 of 1% in buying or selling milk, said Veterinarian or Deputy Veterinarian shall cause his test to be verified and substantiated by the chemist of the Georgia State Department of Agriculture, and if such chemist shall find that the test made by such State Veterinarian or Deputy Veterinarian is correct, the test thus made and verified shall, in all prosecutions for violations of the provisions of this Act be prima facie evidence that the test made by the person engaged in testing, buying, or selling such milk, cream or other dairy products was falsely and fraudulently made, and the State Veterinarian is hereby authorized to recall and cancel the tester's license or permit of such person thus making fraudulent tests, or to bring criminal action against such persons, or both. Acts 1929, p. 283, § 5.

§ 2119(21). Bottles and pipettes, how marked; bond of manufacturer.—All bottles and pipettes used in measuring milk or milk products for making determination of the per cent of fat in said milk or milk products shall have clearly blown or otherwise permanently marked in the side of the bottle or pipette the word "sealed," and in the side of the pipette or the side or bottom of the bottle of the same, initials or trademark of the manufacturer and his designating number, which designating number shall be furnished by the State Veterinarian upon application by the manufacturer and upon the filing

by the manufacturer of a bond in the sum of \$1,000.00 with sureties to be approved by said State Veterinarian, conditioned upon conformance with the requirements of this section. A record of the bonds furnished, the designating numbers, and to whom furnished, shall be kept in the office of the Department of Agriculture. Any manufacturer who sells Babcock, or other milk, cream, or butter test bottles or milk pipettes, to be used in this State, that does not comply with the provisions of this section shall suffer a penalty of \$500.00, to be recovered by the Attorney-General of the State in action in the name of the State, under the bond of such manufacturer; and any dealer who uses, for the purpose of determining the per cent. of milk fat in milk or milk products any bottles or pipettes, purchased after six months from the date of this Act shall take effect, that do not comply with the provision of this section relating thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section 18 of this Act. Acts 1929, p. 284, § 6.

§ 2119(22). Unlawful acts and omissions in handling and sale of milk, cream, ice-cream, etc.—It shall be unlawful: (1) To handle milk, cream, butter, ice-cream or other dairy products in unclean or unsanitary places, or in an unsanitary manner, or to keep, store or prepare for market any milk, cream or other dairy products in the same building or enclosure with any hide or fur house, or any cow, horse, or hog barns or sheds, or other places where live stock is kept. Cream or milk receiving and buying stations must have outside doors or adjustable outside windows; and if cream stations have connecting doors with any other part of the building in which said station may be located, there must be installed at the connecting door a vestibule having solid doors provided with stone springs to keep them closed, and such vestibule must meet the approval of the State Veterinarian. The cream room must be used exclusively for the handling of dairy products. It shall have concrete floor, with proper drainage and sewerage for the disposition of all waste water. It shall be equipped with running water, steam, and other equipment necessary for the thorough washing and sterilization of all cans, pails, separator parts, and anything that may come in direct contact with the milk or cream. The State Veterinarian and his deputies shall have the power, and they are hereby authorized, to forbid the handling of cream, milk, butter, ice-cream or other dairy products in any such place or places which in their judgment are unsanitary and will affect the purity of the milk, cream, butter, ice-cream, or other dairy products handled therein, or that will in any way injure the flavor or market value thereof. (2) To handle or ship milk, cream, or ice-cream, or other dairy products, in unclean or unsanitary vessels, or to expose milk, cream, or ice-cream, or other dairy products to flies or other contaminating influence likely to convey pathogenic or other injurious bacteria to such milk, cream, ice-cream or other dairy products. (3) For any common carrier to neglect or fail to remove or ship from its depot, on the day of its arrival there for shipment, any milk, cream, or other dairy products left at such

depot for transportation. Railway and express companies must not allow merchandise of a contaminating nature to be stored on or with dairy products. (4) To allow milk or cream cans or ice-cream cans or ice-cream packers to remain at a railroad depot longer than one day from the date of their arrival. (5) To use any branded or registered cream can or milk can or ice-cream packer or container for any other purpose than the handling, storing, or shipping, of milk, cream, or ice-cream. It shall be unlawful for any person other than the rightful owner thereof to use any can, bottle, or other receptacle if such receptacle is marked with the brand or trade mark of the owner. (6) For any person, firm, or corporation, purchasing ice-cream in cans, shipping bags and tubs which are to be returned to the manufacturer to not cause such cans to be washed and cleaned as soon as emptied and with the bags and tubs stored in a dry place. (7) To sell or offer for sale milk, cream, butter, cheese, ice-cream, or other dairy products that are not pure and fresh and handled with clean utensils. In all cases it shall be unlawful to sell or offer for sale milk or cream from diseased or unhealthy animals or handled by any person suffering from or coming in contact with persons afflicted with any contagious disease, and it shall be unlawful to sell or offer for sale any milk or cream exposed to contamination or into which have fallen any unsanitary articles or any foreign substance which would render the milk or cream of the product manufactured therefrom unfit for human consumption. It shall be unlawful for any person, firm, or corporation to sell or expose for sale anywhere in this State milk, cream, butter, cheese, ice-cream, or other dairy products containing any preservatives of any kind whatsoever, except common salt or sugar, or that shall not comply with the standards promulgated by the State Veterinarian and approved by the Commissioner of Agriculture. Acts 1929, p. 285, § 7.

§ 2119(23). Pasteurization. — Pasteurization, for the purpose of this Act, is defined to mean the heating of milk, cream, or milk products to a temperature of at least 145 degrees F. and held at such temperature for not less than thirty minutes. All pasteurizing vats used for pasteurizing shall be equipped with a recording thermometer, and for each vat of product pasteurized a separate record chart shall be used, said charts being dated and kept on file until called for by the State Veterinarian or deputy. It shall be unlawful to use any pasteurized milk, cream, or ice-cream mix without having on file, subject to the demand of the State Veterinarian, a true record of pasteurization of said product. The facilities for holding said product at a low temperature until frozen must have the approval of the State Veterinarian. Samples of ice-cream taken for an official test shall be taken with a butter trier from a full or nearly full can of ice-cream in solid condition or directly from the ice-cream freezer. In all fruit creams an allowance of 2% reduction in fat content shall be allowed. Acts 1929, p. 286, § 8.

§ 2119(24). Quarterly reports to State Veterinarian.—Each individual, firm, or corporation

manufacturing ice-cream, butter, cheese, condensed milk, powdered milk, evaporated milk or pasteurizing milk in this State shall make a quarterly report to the State Veterinarian, on blanks furnished by the State Veterinarian, setting forth the amount of their production during the quarter. In the report on ice-cream the average fat and serum solids content shall be given. Each individual, firm, or corporation manufacturing the dairy products set forth herein shall also furnish the State Veterinarian, on blanks furnished by the Veterinarian, the number of pounds of milk, cream, sweet or salt butter, evaporated milk, condensed milk, sweetened condensed milk or powdered milk, he or they have used during the quarterly period under report. The average fat content of the milk and cream used shall be reported. Acts 1929, p. 287, § 9.

§ 2119(25). Condensed or evaporated milk, etc., unlawful additions to.—It shall be unlawful to sell keep for sale, or offer for sale any condensed or evaporated milk, concentrated milk, sweetened condensed milk, sweetened evaporated milk, sweetened concentrated milk, sweetened evaporated skimmed milk, or any of the fluid derivatives of any of them, to which has been added any fat or oil other than milk fat, either under the name of said products or articles or the derivatives thereof, or under any fictitious or trade name whatsoever. Acts 1929, p. 287, § 10.

§ 2119(26). Ice-cream, when deemed adulterated.—Ice-cream shall be deemed adulterated: (1) If it contains saccharin or any preservative, mineral, or other substance or compound deleterious to health; provided that this clause shall not be construed to prohibit the use of harmless coloring matter when not used for fraudulent purposes. (2) If it contains any fats other than milk fat or any oils or paraffin added to, blended with or compounded with it; provided, that chocolate ice-cream and the coating of coated ice-cream may contain cocoa butter. (3) If it is made in whole or in part from, or contains, any milk product which is unfit for food. It shall be deemed unlawful for any person, firm or corporation, his or its servant or agent to manufacture, sell or offer or expose for sale or have in possession with intent to sell or offer or expose for sale under the name of "Ice-Cream" any substance not conforming with the provisions of the three preceding sections; or to sell ice-cream from a container or a compartment of a cabinet or fountain, which contains any article of food other than ice-cream or dairy products. Acts 1929, p. 288, § 11.

§ 2119(27). License, quarterly payments by butter manufacturers.—It shall be unlawful for wholesale or retail milk plant or plants built to manufacture butter, ice-cream, cheese, condensed milk or milk powder in the State of Georgia without first having applied for and obtained a license, signed by the State Veterinarian, bearing the seal of his office. Such license shall be conspicuously displayed in the applicants place of business; and the payment of the quarterly butter-fat tax in accordance with the following schedule:

Creameries: That each person, firm, partnership, company, or corporation engaged in the

manufacture of butter shall pay, through the office of the State Veterinarian, not later than the fifteenth day of January, April, July and October, five cents (5c) for each one thousand pounds of butter fat purchased from producers during the three preceding calendar months.

Ice-Cream Factories: That each person, firm, partnership, company or corporation engaged in the manufacture of ice-cream shall pay, through the office of the State Veterinarian, not later than the fifteenth day of January, April, July and October, fifty cents (50c) for each one thousand gallons of ice-cream manufactured during the three preceding calendar months.

Cheese Factories: That each person, firm, partnership, company or corporation engaged in the manufacture of cheese shall pay, through the office of the State Veterinarian, not later than the fifteenth day of January of each year, five cents (5c) for each thousand pounds or fraction thereof of butter fat purchased during the preceding year.

Condenseries and Milk Powder Plants: That each person, firm, partnership, company or corporation engaged in the manufacture of condensed milk, condensed skimmed milk, powdered milk or powdered skimmed milk, shall pay, through the office of the State Veterinarian, not later than the fifteenth day of January, April, July and October, five cents (5c) for each one thousand pounds of butter fat purchased during the three preceding calendar months.

Milk Plants: That each person, firm, partnership, company or corporation engaged in the pasteurization of milk or the bottling of raw or pasteurized milk or the handling of whole milk for the purpose of wholesale or retail sale, shall pay, through the office of the State Veterinarian, not later than the fifteenth day of January, April, July and October, five cents (5c) for each thousand gallons of milk purchased during the three preceding calendar months.

Nothing in this Act pertaining to the manufacture of butter shall apply to farmers or producers of milk and cream when churning milk or cream produced on their own farm, into what shall be known as dairy, country, or farm butter, or to prohibit such producers from making cheese out of milk and cream produced on their own farm, or prevent them from selling their milk or cream to individuals, hotels, restaurants or boarding houses. Acts 1929, p. 288, § 12.

§ 2119(28). Cream tester's license; field superintendent's license; annual fee \$5.—It shall be unlawful to establish cream or milk buying station and install any person or persons as station operators without first having obtained a cream tester's license from the State Veterinarian. (2) Field superintendent's license may be obtained by making application to the State Veterinarian, passing the examination given under his direction, and paying the annual fee of five (\$5.00) dollars, such licenses being renewable each year on the payment of the annual fee unless cancelled because the holder thereof has been found guilty of violating the dairy law or the rules and regulations based thereon. Acts 1929, p. 290, § 13.

§ 2119(29). Station license; annual fee \$2; revo-

cation.—It shall be unlawful to establish any milk or cream buying stations without first having obtained a station license from the State Veterinarian. Such license may be obtained by making application accompanied by the annual fee of two (\$2.00) dollars, such license to be in force for one year, subject to revocation by the State Veterinarian at any time the station shall be found to be constructed or operated in violation of the provisions of this Act. Acts 1929, p. 290, § 14.

§ 2119(30). Milk and cream brokerage; license; annual fee \$10; quarterly reports.—It shall be unlawful to engage in the milk or cream brokerage business without first having obtained a license from the State Veterinarian to operate and conduct such business. Milk and cream brokerage as those of the dairy manufacturing plant being subject to the annual license fee of ten dollars (\$10.00). The State Veterinarian may require quarterly reports from such brokerage firms, showing the quantity of dairy products they are selling in the State. Acts 1929, p. 290, § 15.

§ 2119(31). Annual reports to State Veterinarian, as to purchase of milk and cream, amount of fat, price.—Creameries, ice-cream plants, milk plants (and cream and milk stations when buying cream or milk for plants operating outside the State) shall report annually on or before the 1st day of January of each year the amount of milk or cream or both purchased during the last year, with the amount of fat in the milk or cream, and price paid for same. Any other data or statistics desired by the State Veterinarian shall be reported to him by said parties, firms or corporations according to and on blanks furnished by said Veterinarian. The above concerns shall keep complete and accurate records of their business, and the State Veterinarian shall have free access to all such records.

Said dairy manufacturing plants whose plants are located outside the State and are buying their milk and cream in the State of Georgia shall be subject to all regulations specified within this Act, being subject to the payment of all taxes, licenses and butter-fat tax on volume of the raw material purchased within the State of Georgia. Acts 1929, p. 290, § 16.

§ 2119(32). Money received by State Veterinarian, how handled.—All monies paid to or received by the State Veterinarian under the provisions of this Act shall be handled through the funds of the State Department of Agriculture and be paid into the State Treasury, quarterly, by the Commissioner of said department, there to be placed in a separate fund, which is hereby appropriated to the State Department of Agriculture for administering the provisions of this Act. Any unexpended balance now in funds available for the Dairy Division are hereby reappropriated and made a part of the above-named fund, and any unexpended balance in said fund at the close of any fiscal year is hereby reappropriated to the State Department of Agriculture for the ensuing year. The State Auditor is hereby authorized to draw warrants against this separate fund, upon presentation of properly itemized and fully verified

vouchers, approved by Commissioner of Agriculture. Acts 1929, § 17.

§ 2119(33). **Violation of Act, a misdemeanor; penalty.**—Any person, firm or corporation, and any officer, agent, representative, servant or employee of such person, firm or corporation who violates any of the provisions of this Act shall be guilty of a misdemeanor, and his or their permit or license shall be subject to suspension or cancellation by the State Veterinarian. Upon conviction the offender shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00) for each offense. Acts 1929, p. 291, § 18.

§ 2119(34). **Enforcement of Act.**—The State Veterinarian, by himself or his deputies, shall be charged with the enforcement of this Act. Acts 1929, p. 292, § 19.

§ 2119(35). **Shipments from foreign state.**—Nothing in this Act shall be construed to prohibit the shipments into this State from a foreign State and the first sale thereof in this State, in the original package intact and unbroken, of any of the products or articles, the manufacture, sale or exchange of which, or possession of which with intent to sell or exchange, is prohibited thereby. Acts 1929, p. 292, § 20.

SIXTEENTH TITLE

State Board of Game and Fish.

CHAPTER 1

Creation of Board.

§ 2158(j-14). **Park's Code.**

See § 2158(4½).

§ 2158(4½). **Powers of board over fishing during spawning seasons; recommendations by grand jury.**—Upon the recommendation of the grand jury of any county, except counties having a population of not less than 13,600 and not more than 14,300 according to the official census of the United States for 1920 or any future census, the said Board of Game and Fish shall have the power to regulate or prohibit the taking of fish from any streams or other waters of this State during any month or months in which said fish in said waters commonly spawn. That when such recommendation has been made by any grand jury and a certified copy thereof prepared by the clerk of the superior court of the county in which such action is had, and transmitted to the Board of Game and Fish, it shall be the duty of said board to and it shall be required to immediately pass an order carrying out the recommendation of said grand jury and advertise said order in the county affected in a newspaper of general circulation therein once a week for four

weeks; and such order shall not be effective until thus advertised. That the recommendation of the grand jury as aforesaid shall specify the period of time during which said fishing shall be regulated or prohibited. Acts 1925, pp. 302, 308; 1929, p. 238, § 1.

Editor's Note.—The Act of 1929, excepted the counties stated from the operation of this section, and by section 2 declared null and void any recommendation by any grand jury heretofore made, in any excepted county pursuant to this code section, as well as any and all orders passed by the Board of Game and Fish, pursuant to any such recommendation.

CHAPTER 2

State Commissioner of Game and Fish. Tidewater Commissioners, Wardens, Inspectors and Patrolmen.

§ 2158 (14). **Tidewater commissioner's office.**

This section does not mean that an office temporarily located within such territory shall be permanently established in one fixed place. But such board can, in the exercise of its sound discretion, remove and locate the office of the tidewater commissioner to some convenient place in "tidewater Georgia" that is best suited for its purposes. *City of Darien v. Clancy*, 167 Ga. 848, 146 S. E. 767.

Where a city located within the territory described in the act of 1924 offered, as an inducement to the State Board of game and fish, a certain dock and lights and water free if the office of the tidewater commissioner was located in that city, and the board did accept such inducements by locating the office of the commissioner temporarily within such city, and used such offered inducement, this would not create such "vested rights" in behalf of the city, under the written instrument as set out in the petition, as that the board could not subsequently, in the exercise of a sound discretion, remove such office to another city located within the tidewater territory, which was more "convenient" for the purposes of the board. *City of Darien v. Clancy*, 167 Ga. 848, 146 S. E. 767.

CHAPTER 3.

Oysters and Oyster Beds.

§ 2158(24). **Owners of private oyster beds may come under Act.**

Cited in *Camp v. State*, 34 Ga. App. 591, 130 S. E. 606.

CHAPTER 4

Licenses

§§ 2158(j-21)-2158(j-22). **Park's Code.**

See § 2158(30¼).

§ 2158(30¼). **Trapper's license fee.**—One who traps fur-bearing animals for the purpose of selling animals or their hides, skins, or pelts shall be required to provide himself with a trapper's license to be issued by the Commissioner of Game and Fish, on written application, upon the same conditions as are prescribed for the is-

suance of hunting license: Provided, however, that nothing in this section shall apply to the purchase of a license for the trapping of furbearing animals for the purpose of selling their hides, skins, or pelts in counties of this State having a population of not more than 8,406 or less than 8,400 according to the official United States census of 1920. A trapper's license shall be issued to a resident of the State of Georgia upon the payment of a fee of \$3.00, and to a non-resident upon the payment of a fee of

\$25.00. All trapper's licenses shall authorize the holder to engage in trapping anywhere in the State of Georgia. Acts. 1925, pp. 302, 305, §§ 12, 13; 1929, p. 333, § 1.

Editor's Note.—This section as originally appearing was codified from §§ 12 and 13 of the Act of 1925, § 12 including the first sentence of the code section and the penal provision codified as P. C. § 594(13). Acts of 1929, p. 333, amended § 12 of the Act of 1925, by adding the proviso excepting the counties stated from the operation of the law. But the Act of 1929, p. 334, subsequently approved, repealed said § 12 without making any reference to the Act of 1925, p. 333.

THE CIVIL CODE

FIRST TITLE

Of Persons.

CHAPTER 1.

Different Kinds of Persons, Their Rights and Duties.

ARTICLE 1.

Of Citizens.

§ 2159. (§ 1802.) Natural and artificial persons.

Creation of Corporation Legislative Function.—A corporation can be brought into existence only as the result of express legislation. The conference of power upon persons to organize a corporation is legislative in character, and must be done by direct legislation, or be founded upon legislative or constitutional provisions. *Free Gift Society v. Edwards*, 163 Ga. 857, 865, 137 S. E. 382.

§ 2167. (§ 1810.) Females.

Cited in *Curtis v. Ashworth*, 165 Ga. 782, 786, 142 S. E. 111.

ARTICLE 3.

Of Persons of Color.

§ 2177. (§ 1820.) Who are persons of Color.—

All negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color. Acts 1865-6, p. 239; 1927, p. 272.

Editor's Note.—This section prior to its amendment was much less broad. It merely included negroes, mulattoes, mestizos, and their descendants, having one-eighth negro or African blood in their veins.

§ 2177(1). **Registration as to race.**—The State Registrar of Vital Statistics, under the supervision of the State Board of Health, shall prepare a form for the registration of individuals, whereon shall be given the racial composition of such individual, as Caucasian, Negro, Mongolian, West Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then the racial composition of the parents and other ancestors in so far as ascertainable, so as to show in what generation such mixture occurred. Said form shall also give the date and place of birth of the registrant, name, race, and color of the parents of registrant, together with their place of birth if known, name

of husband or wife of registrant, with his or her place of birth, names of children of registrant with their ages and place of residence, place of residence of registrant for the five years immediately preceding registration, and such other information as may be prescribed for identification by the State Registrar of Vital Statistics. Acts 1927, p. 272.

§ 2177(2). **Supply of forms.**—The State Registrar of Vital Statistics shall supply to each local registrar a sufficient number of such forms to carry out the provisions of this Act.

§ 2177(3). **Local registrar must cause each person in district to execute form., etc.**—Each local registrar shall personally or by deputy, upon receipt of said forms, cause each person in his district or jurisdiction to execute said form in duplicate, furnishing all available information required upon said form, the original of which form shall be forwarded by the local registrar to the State Registrar of Vital Statistics, and a duplicate delivered to the ordinary of the county. Said form shall be signed by the registrant, or, in case of children under fourteen years of age, by a parent, guardian, or other person standing in loco parentis. The execution of such registration certificate shall be certified to by the local registrar.

§ 2177(4). **Untrue statement.**—If the local registrar have reason to believe that any statement made by any registrant is not true, he shall so write upon such certificate before forwarding the same to the State registrar or ordinary, giving his reason therefor.

§ 2177(5). **Penalty for refusal to execute registration certificate, etc.** — It shall be unlawful for any person to refuse to execute said registration certificate as provided in this Act, or to refuse to give the information required in the execution of the same; and any person who shall refuse to execute such certificate, or who shall refuse to give the information required in the execution of the same, shall be guilty of a misdemeanor, and shall be punished as prescribed in section 1065 of the Penal Code of Georgia of 1910. Each such refusal shall constitute a separate offense.

§ 2177(6). **Fee for registration 30 cents; how divided.**—The local registrar shall collect from each registrant a registration fee of thirty cents, fifteen cents of which shall go to the local registrar and fifteen cents of which shall go to the State Board of Health, to be used in defraying expenses of the State Bureau of Vital Statistics. If any registrant shall make affidavit that through poverty he is unable to pay said registration fee of thirty cents, the local registrar shall receive a registration fee of only ten cents for such registration, which sum shall be paid out of the funds of the State Bureau of Vital Statistics, and the State Bureau of Vital Statistics shall receive no fee for

such registration. This section shall not apply to the registration of births or deaths, the registration of which is otherwise provided for.

§ 2177(7). False registration, felony; punishment.—It shall be a felony for any person to wilfully or knowingly make or cause to be made a registration certificate false as to color or race, and upon conviction thereof such person shall be punished by imprisonment in the penitentiary for not less than one year and not more than two years. In such case the State registrar is authorized to change the registration certificate so that it will conform to the truth.

§ 2177(8). Form of application for marriage license.—The State Registrar of Vital Statistics shall prepare a form for application for marriage license, which form shall require the following information to be given over the signature of the prospective bride and groom; name and address; race and color; place of birth; age; name and address of each parent; race and color of each parent; and whether the applicant is registered with the Bureau of Vital Statistics of this or any other State, and, if registered, the county in which such registration was made. The State Registrar of Vital Statistics shall at all times keep the ordinaries of each county in this State supplied with a sufficient number of said form of application for marriage license to care for all applications for marriage license. Each prospective bride and each prospective groom applying for marriage license shall fill out and execute said application in duplicate.

§ 2177(9). Filing application for marriage license.—Upon such applications for marriage license being filed with the ordinary by the prospective bride and prospective groom, the ordinary shall forward the original of such application to the State Registrar of Vital Statistics, and retain the duplicate of such application in his files.

§ 2177(10). Report by State Registrar of Vital Statistics after examination as to registration of applicant.—The ordinary shall withhold the issuing of any marriage license until a report upon such application has been received from the State Registrar of Vital Statistics. Said report from the State Registrar of Vital Statistics shall be forwarded to the ordinary by the next return mail, and shall state whether or not each applicant is registered in the Bureau of Vital Statistics; if registered, the report shall state whether the statements made by each applicant as to race and color are correct according to such registration certificate. If the registration certificate in the office of the Bureau of Vital Statistics show that the statement of either applicant as to race or color are untrue, the report of the State Registrar of Vital Statistics shall so state, and in such case it shall be illegal for the ordinary to issue a marriage license to the applicants, until the truth of such statements of the applicants shall have been determined in a legal proceeding brought against the ordinary to compel the issuing of such license. If the report from the State Registrar of Vital Statistics shows that the applicants are not registered, and if the State Bureau of Vital Sta-

tistics has no information as to the race or color of said applicants, then the ordinary shall issue the marriage license if he has no evidence or knowledge that such marriage would be illegal. If one of the applicants is registered with the State Bureau of Vital Statistics and the other applicant is not so registered, if the records of the Bureau of Vital Statistics contain no information to disprove the statements of either applicant as to color or race, then the ordinary shall issue the marriage license, if he has no evidence or knowledge that such marriage would be illegal. Provided, that where each party is registered and such registration certificate is on file in the office of the ordinary of the county where application for marriage license is made, it shall not be necessary for the ordinary to obtain any information from the State Bureau of Vital Statistics; and provided further, that when any person who has previously registered as required herein moves to another county, he may file with the ordinary of the county of his new residence a certified copy of his registration certificate, which shall have the same effect as if such registration had been made originally in said county.

§ 2177(11). Application for marriage license by one not born in this State.—Where any application for marriage license shows that such applicant was not born in this State and is not registered with the Bureau of Vital Statistics of this State, the ordinary shall forward a copy of such application to the State Registrar of Vital Statistics of this State, and shall also forward a copy of the application to the clerk of the superior or circuit court, as the case may be, of the county of the applicant's birth, and another copy to the Bureau of Vital Statistics, at the capitol of the State, of the applicant's birth, with the request that the statements therein contained be verified. If no answer be received from such clerk or Bureau of Vital Statistics within ten days, the ordinary shall issue the license if he have no evidence or knowledge that such marriage would be illegal. If an answer be received within ten days, showing the statement of such applicant to be untrue, the ordinary shall withhold the issuing of the license until the truth of such statements of the applicant shall have been determined in a legal proceeding brought against the ordinary to compel the issuing of such license. In all cases where answers are received from such clerk or Bureau of Vital Statistics, a copy of the answer shall be forwarded to the State Registrar of Vital Statistics of this State.

§ 2177(12). Return of license after marriage.—When a marriage license is issued by the ordinary, it shall be returned to the ordinary by the officer or minister solemnizing the marriage, and forwarded by the ordinary to the State Registrar of Vital Statistics, to be permanently retained by said registrar.

§ 2177(13). "White person" defined.—The term "white person" shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person shall be deemed to be a white person any one of whose ancestors has been

duly registered with the State Bureau of Vital Statistics as a colored person or person of color.

§ 2177(14). Unlawful for whites to marry other than white; penalty.—It shall be unlawful for a white person to marry any save a white person. Any person, white or otherwise, who shall marry or go through a marriage ceremony in violation of this provision shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than one nor more than two years, and such marriage shall be utterly void.

§ 2177(15). False statement in application; penalty.—Any person who shall make or cause to be made a false statement as to race or color of himself or parents, in any application for marriage license, shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than two nor more than five years.

§ 2177(16). Ordinary's noncompliance with law.—Any ordinary who shall issue a marriage license without complying with each and every provision of this Act shall be guilty of and punished as for a misdemeanor.

§ 2177(17). Performing marriage ceremony in violation of law.—If any civil officer, minister, or official of any church, sect, or religion, authorized to perform a marriage ceremony, shall wilfully or knowingly perform any marriage ceremony in violation of the terms of this Act, he shall be guilty of and punished as for a misdemeanor.

§ 2177(18). Report of violation of law.—If any case of a marriage in violation of the provisions of this Act is reported to the State Registrar of Vital Statistics, he shall investigate such report, and shall turn over to the Attorney-General of the State the information obtained through such investigation.

§ 2177(19). Birth of legitimate child of white parent, and colored parent, report of, and prosecution.—When any birth certificate is forwarded to the Bureau of Vital Statistics, showing the birth of a legitimate child to parents one of whom is white and one of whom is colored, it shall be the duty of the State Registrar of Vital Statistics to report the same to the Attorney-General of the State, with full information concerning the same. Thereupon it shall be the duty of the Attorney-General to institute criminal proceedings against the parents of such child, for any violation of the provisions of this Act which may have been committed.

§ 2177(20). Duty of Attorney-General and solicitor-General as to prosecution.—It shall be the duty of the Attorney-General of the State, as well as the duty of the Solicitor-General of the Superior Court where such violation occurs, to prosecute each violation of any of the provisions of this Act, when the same is reported to him by the State Registrar of Vital Statistics. If the Attorney-General fails or refuses to prosecute any

such violation so reported to him by the State Registrar of Vital Statistics, the same shall be grounds for impeachment of the Attorney-General, and it shall be the duty of the State Registrar of Vital Statistics to institute impeachment proceedings against the Attorney-General in such case.

CHAPTER 2

Of Domicile, and Manner of Changing the Same

§ 2181. (§ 1824.) Domicile.

Meaning of "Permanently" as Used in Section.—The word "permanently" is used in this section in contradistinction from the word "temporarily." *Alvaton Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S. E. 781.

Residence and Domicile Distinguished.—The removal to another county and there renting a house, did not constitute a change of domicile, where the removal was for the purpose of educating children, the former home was maintained, the incidents of citizenship there discharged, and there was at no time an intention to provide a fixed place of abode in the place of removal, or to there establish permanent residence. *Alvaton Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S. E. 781. See § 2186 and notes thereto.

§ 2186. (§ 1829.) Change of domicile.

Involves Exercise of Volition and Choice.—As to a person sui juris, the matter of making a change in domicile is one involving the exercise of volition and choice. *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S. E. 826. See notes to § 2181.

§ 2187. (§ 1830.) Of persons not sui juris.

Presumption and Proof of Change.—Where a resident of this state was adjudged insane by the courts of this state in 1910, he was at least prima facie incapable thereafter of making a change of his domicile. Proof that, after such adjudication, he "went over to stay with his people in North Carolina," and was placed in a public institution of that state for insane persons, is insufficient to show that such person ceased to be a resident of the state of Georgia, or that his removal from this state was such as to suspend the operation of the statute of limitations as to a debt against him. *Stanfield v. Hursey*, 36 Ga. App. 394. Compare *Jackson v. Southern Flour, etc., Co.*, 146 Ga. 453, 91 S. E. 481.

Cannot Change of Own Volition.—A person who has been adjudged insane can not, by his own act or volition, effect a change in his domicile. *Stanfield v. Hursey*, 36 Ga. App. 394, 395, 136 S. E. 826.

SECOND TITLE

Corporations.

CHAPTER 1

Corporations, Their Creation, Powers, and Liabilities

ARTICLE 2

Their Creation

§ 2192(1). Application for charter, etc.; unlawful use of name; notice.

By Transferee of Purchaser of Business.—Having the

right to use the name, which is included in the good-will expressly sold under a contract, the purchaser could transfer and assign this right, and the transferee of this right would have the authority to procure a charter for the purpose of carrying on the business under the same name or substantially the same name as original vendor corporation. *Morgan v. Frank E. Block Co.*, 167 Ga. 463, 146 S. E. 19.

ARTICLE 4

Corporation Commissioner

§ 2209. Returns of corporations.

Editor's Note.—The section does not in any manner purport by its terms to prohibit a corporation from doing business in this State until it shall have filed the report. Accordingly, a corporation doing business in this State prior to making the report does not thereby violate the terms of the section, the terms of the statute which in such a case it does violate being merely the requirement to file the report, and pay the fee provided for in section 2210, which breach renders the corporation subject, within the discretion of the secretary of state, to the penalty imposed thereby. See *Alston v. New York Contract Purchase Corp.*, 36 Ga. App. 777, 138 S. E. 270.

§ 2210. Fees.

See Editor's Note under section 2209.

§ 2211. Penalty for non-compliance.

Effect of Non-Conformance upon Contracts.—The penalty prescribed being all inclusive, and the corporation not being prohibited by such breach of duty from doing business within the State, its contracts are not rendered void by a failure to comply with the requirements mentioned. *Alston v. New York Contract Purchase Corp.*, 36 Ga. App. 777, 138 S. E. 270. See Editor's Note under section 2209.

ARTICLE 5

Powers and Liabilities of Corporations

§ 2216. (§ 1852). Common powers.

By-Laws Must Not Be Inconsistent with Charter.—By-laws adopted under authority of this section must, of course, not be inconsistent with the charter of the corporation and the purposes for which the corporation was created, must not infringe the common or statute law of the State, must be reasonable, must not defeat or impair any vested right of its stockholders or members, and must not be contrary to public policy. *Hornady v. Goodman*, 167 Ga. 555, 572, 146 S. E. 173.

Cited in *McKenzie v. Guaranteed Bond, etc., Co.*, 168 Ga. 145, 148, 147 S. E. 102.

§ 2219. (§ 1855). Transfer of shares, when complete.

Applied in *Mack v. Pardee*, 39 Ga. App. 310, 318, 147 S. E. 147.

§ 2220. (§ 1856). Organization before capital subscribed for.

In General.—While individuals can not bind a corporation without express or implied authority from the stockholders or the board of directors, they can bind themselves by organizing and transacting business of the corporation before the minimum capital stock has been subscribed, under this section. *Grandall v. Shepard*, 166 Ga. 396, 143 S. E. 587.

This section is not a legislative enactment, but a codification of the principle announced in *Burns v. Beck & Gregg Hdwe. Co.*, 83 Ga. 471 (6), 10 S. E. 121. See *Ham v. Robinson Co.*, 146 Ga. 422, 445, 91 S. E. 483; *Howard v. Long*, 142 Ga. 789, 791, 83 S. E. 852; *Mobley v. Sasser*, 38 Ga. App. 382, 383, 144 S. E. 151.

This section has not been repealed, amended, or modified by direct legislation. *Mobley v. Sasser*, 38 Ga. App. 382, 384, 144 S. E. 151.

Neither under the provisions of § 2220 of the Civil Code of 1910, nor under the provisions of the general banking act, did the superintendent of banks have any authority for bringing these suits. See § 2366(52). *Mobley v. Sasser*, 38 Ga. App. 382, 144 S. E. 151.

Set-Off.—Against an action at law, brought by one of the organizers and participants referred to in this section, on a note given by one of the creditors in renewal of an accommodation note given to the corporation so organized without its minimum capital stock subscribed, the maker can set off in equity the liability of the holder of the renewal note under that statute. *Grandall v. Shepard*, 166 Ga. 396, 143 S. E. 587.

§ 2224. (§ 1860). Proceedings by minority stockholders, when allowed.

Applied in *Peoples Bank v. So. Investment Co.*, 164 Ga. 31, 137 S. E. 547.

§ 2225. (§ 1861). Responsibility for acts of officers.

Where By-Law Not Known to Plaintiff.—In a suit upon a note executed in behalf of a corporation by one as manager, the corporation having authority under its charter to issue negotiable paper in the due and ordinary course of its business (*Jacobs Pharmacy Co. v. Southern Banking, etc., Co.*, 97 Ga. 573, 25 S. E. 171), it is no defense that by reason of a by-law, not known to the plaintiff, only the president could execute notes in behalf of the corporation. *LaGrange Lumber & Supply Co. v. Farmers & Traders Bank*, 37 Ga. App. 409, 140 S. E. 765.

M. having apparent authority as assistant manager to execute indorsements, even the corporation represented by him could not defeat such indorsements merely by alleging that in truth and in fact he had no such authority and that his act in indorsing the paper had not been ratified. Much less could the indorsement be defeated by a third person (as in this case the defendant acceptor) by allegations which altogether fail to charge the plaintiff with notice of such lack of authority in the agent. *Mas-sell v. Fourth Nat. Bank*, 38 Ga. App. 601, 604, 144 S. E. 806.

§ 2226. (§ 1862.) No collateral attack as to corporate existence.

Editor's Note.—This section is merely a codification of the universally accepted doctrine. Since the Dartmouth College Case the principle then announced that a charter to a private corporation constitutes a contract between the State and the incorporators have been controlling, and this alone is sufficient reason why persons not parties to the contract should not be allowed to attack its validity. That right belongs to the State. The State having bestowed life upon the corporation and dictated what it can and can not do, also has the right to waive violations of the contract on the part of the incorporators. However, this doctrine should never be applied in favor of the said incorporators themselves, to the prejudice of a person who has not dealt with them as a corporation. Hence, any person whose property is sought to be taken under the right of eminent domain may challenge the legality of the corporation's charter, such person not having recognized or dealt with the corporation as such. *Rogers v. Taccoa Power Co.*, 161 Ga. 524, 131 S. E. 517. See also *Academy of Music v. Flanders Bros.*, 75 Ga. 14; 20 Harvard Law Review 472.

ARTICLE 7

Liability of Stockholders

§ 2247. (§ 1888). Liability of stockholder after transfer of stock.

See § 2366(71).

It is not essential to the liability of a stockholder in an insolvent banking corporation, for the assessment of his capital stock in the corporation for the benefit of the creditors of the corporation that the stock stand on the books of the corporation in the name of the stockholder assessed, but such assessment may be made against the real owner, although the stock stands on the books of the corporation in the name of another who has no interest therein. *Doster v. Mobley*, 38 Ga. App. 508, 144 S. E. 385.

ARTICLE 9

Corporations, How Served

§ 2258. (§ 1899.) Service of process, how perfected.

II. SERVICE UPON AGENT.

What Constitutes an Agent within Meaning of Section.—Where the person upon whom a rule nisi was served exercised large discretionary and supervisory powers he was held to be an agent of the defendant company, within the meaning of the section. *Georgia Creosoting Co. v. Fowler*, 35 Ga. App. 372, 133 S. E. 479.

Same—Ticket Agent of Railroad Selling for Pullman Company.—Where the ticket agents of a railroad company sold tickets furnished to them by the Pullman Company and accounted therefor directly to that company from which they received instructions under an agreement without compensation, they were agents of the Pullman Company who represented it in its business and on whom service of process might legally be made in a suit against it, under this section. *Huckabee v. Pullman Co.*, 8 Fed. (2d), 43.

Same—Agents Other Than One Designated for Service.—That a foreign corporation has designated certain persons as its agents for service in the state does not render invalid service of process against it on others, who are in fact its agents for that purpose under the provisions of the state statute. *Huckabee v. Pullman Co.*, 8 Fed. (2d), 43.

III. LEAVING COPY AT PLACE OF BUSINESS.

The essentials for a suit against a foreign corporation are that it shall be engaged in business in the state, and under this section, that service be made upon an agent who represents the corporation in its business or by leaving the process at the place of transacting the usual and ordinary public business of such corporation. *Huckabee v. Pullman Co.*, 8 Fed. (2d), 43.

IV. APPLIED TO FOREIGN CORPORATIONS.

As to who is agent, see II. Service upon Agent; as to place of service, see III. Leaving Copy at Place of Business; as to sufficiency of return, see V. The Return.

V. THE RETURN.

What Return Should Show.—A return of service of process on a foreign corporation, by leaving a copy of the writ "at the office and place of doing business of said corporation," but which failed to state that it was "the place of transacting the usual and ordinary public business of such corporation," is insufficient under this section. *Huckabee v. Pullman Co.*, 8 Fed. (2d), 43.

§ 2259. (§ 1900.) Where suits may be brought on contracts or for tort.

This history of the legislation upon the subject of the venue of suits against corporations discloses that, with the possible exceptions of insurance and telegraph companies, suits against domestic corporations may, and in the case of railroads shall, be brought in the county where the torts are committed, or where contracts are made or to be performed. Acts permitting corporations to be sued in counties other than those of their domicile should, because of the above constitutional principle and the policy embraced therein, be construed strictly, and not extended beyond the requirements of their terms. *Citizens & Southern Bank v. Taggart*, 164 Ga. 351, 358, 138 S. E. 989, citing *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709.

This section does not repeal, but is cumulative only of the general provisions of law that suits against domestic corporations, including suits *ex contractu*, may be brought

within the county where, by the charter of the corporation, its principal office is located. See, in this connection. *Southern Lumber Co. v. Ramsey-Wheeler Co.*, 38 Ga. App. 481, 144 S. E. 349.

CHAPTER 2

Private Corporations

ARTICLE 1

Banks

SECTION 1

Preliminary Provisions

§§ 2262(a), 2262(c), 2262(f). Park's Code.

See §§ 2366(1), 2366(3), 2366(6), respectively.

§ 2263(j). Park's Code.

See § 2366(16).

§ 2267(e). Park's Code.

See § 2366(49).

§§ 2268(e)-2268(g). Park's Code.

See § 2366(56)-2366(58).

§§ 2268(g-1), 2268(i), 2268(j), 2268(l). Park's Code.

See §§ 2366(52), 2366(60), 2366(61), 2366(63), respectively.

§§ 2268(n), 2268(p), 2268(s), 2268(t) 2268(x). Park's Code.

See §§ 2366(66), 2366(67), 2366(70), 2366(71), 2366(75), respectively.

§§ 2269(a), 2269(g). Park's Code.

See §§ 2366(80), 2366(86), respectively.

§§ 2279(a)-2279(d), 2279(g). Park's Code.

See §§ 2366(139)-2366(142), 2366(145).

§§ 2280(b), 2280(e), 2280(k), 2280(m). Park's Code.

See §§ 2366(148), 2366(151), 2366(157), 2366(159), respectively.

§§ 2280(n), 2280(r), 2280(w), 2280(hh). Park's Code.

See §§ 2366(160), 2366(164), 2366(169), 2366(180), respectively.

§§ 2280(mm), 2280(pp), 2280(rr), 2280(tt). Park's Code.

See §§ 2366(185), 2366(188), 2366(190), 2366(192), respectively.

§§ 2280(vv), 2280(vv-1), 2280(vv-2). Park's Code.

See §§ 2366(194), 2366(195a), 2366(195b).

§§ 2282(b), 2282(c). Park's Code.

See §§ 2366(196a), 2366(196b).

§ 2366(1). Bank, definition of.

Constitutionality.—The banking act is not unconstitutional because in conflict with the constitution, section 6437, which provides that "No law or ordinance shall pass which refers to more than one subject-matter." *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

Nor is the act violative of the foregoing constitutional provisions for the reason that there is contained in the body of the act "matter different from what is expressed in the title thereof." *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

Nor does it violate the constitution, section 6379. It is within the power of the General Assembly, without violating the constitution to impose upon a designated official the exercise of duties essentially ministerial, though quasi-judicial, by the creation of administrative departments subject to the Governor as the head of the executive department, and thus to create new departments which in no wise affect the distinctness and independence of either the legislative, judicial, or executive departments provided for by the constitution. *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

§ 2366 (2). Depositors.

See notes to § 2366(139).

A "deposit" is or is not, according to agreement, subject to check on the bank with which it was actually placed, and may or may not bear interest, and may be or may not be payable on demand. The issuance of a passbook is not conclusive evidence, but is material on the question whether the transaction is simply that of borrower and lender in the ordinary sense or that of a deposit. *Citizens Bank v. Mobley*, 166 Ga. 543, 549, 144 S. E. 119.

It is useless to endeavor to frame a rule by which a "deposit" may be differentiated in every case from a mere "loan" as applied to banking transactions, and it is wholly unnecessary in deciding the present case. *Citizens Bank v. Mobley*, 166 Ga. 543, 548, 144 S. E. 119.

§ 2366(3) Branch banks.—Branch banks, already established under the law of this State, shall be operated as branches, and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier, and such other officers that may be required to properly conduct the business of said branch; and a board of directors, or loan committee, shall be responsible for the conduct and management of said branch, but not of the parent bank or of any other branch save that of which they are officers, directors, or committee. By January tenth of each tax year the board of directors of the parent shall set aside for the exclusive use of said branch such proportion of its entire capital that the total deposits of such branch bank on January first of each tax year bears to the grand total of all the deposits on January first of each tax year in all branches of such bank, or banking association, including the parent bank, in this State. Branch banks shall be taxed on the capital set aside, as herein provided, to their exclusive use in the counties, municipalities, and districts in which they are located, and the parent banks shall be relieved of taxation to the extent of capital so set aside for the exclusive use of such branch; provided, that the real estate owned or held by branch banks shall be taxed in the county, municipality, and district where located, as other real estate situated in such county, municipality, and district, the same to be deducted from either the value of the capital of the parent bank or the respective branch bank. It shall be the duty of the board of directors of the parent bank to fur-

nish a sworn statement to the taxing authorities of the county, municipality, and district in which the branch bank is located, of the total amount of deposits on January first of each tax year in each of the branch banks, including the parent bank, and such sworn statement shall be filed with such taxing authorities not later than March first of each tax year, and shall, at the same time, furnish to such taxing authorities a sworn statement of the proportionate part of the capital of such bank, or banking association, so set aside, as herein provided, for such county municipality, and district for taxing purposes for that year. If the taxing authorities in any county, municipality, and district are not satisfied with the amount of capital set aside for such county, municipality, and district for taxation, such taxing authorities shall have the right to file with the Superintendent of Banks of this State objections to the amount of capital so set aside, and, upon ten days written notice to the directors of the parent bank and to such authorities, such superintendent shall hear evidence, at a time and place to be fixed by him in such notice, and determine, what amount should have been set aside to such branch bank for taxation in the county, municipality, and district in which it is situated, as herein provided, and his decision on the question shall be final, and the amount of capital so set apart by him shall be subject to taxation in such county, municipality, and district in which such branch bank is situated. Capital, as used in this section, shall include surplus and undivided profits, except real estate owned or held by the bank. After this section takes effect, no new or additional branch banks shall be established. Acts 1919, pp. 135, 136; 1920, pp. 102, 108; 1927, p. 195.

Editor's Note. — This section was so enlarged by the amendment of 1927 that few of its provisions were found in the original section, while other provisions were left out from its scope. The changes effected are too multifarious for specific description, and may only be determined by close comparison of the old and the new section.

§ 2366(3a). Branch banks in cities of 80,000 to 125,000 population.—Banks chartered under the laws of this State, and having their principal office in a city now or hereafter having a population of not less than eighty thousand or more than one hundred and twenty-five thousand, may establish branch banks in the city in which its principal office is located. Acts 1929, p. 214, § 1.

§ 2366(3b). Branch banks in cities of 200,000 population.—Banks chartered under the laws of this State, and having their principal office in a municipality now or hereafter having a population of not less than 200,000 according to the last census of the United States of any future census of the United States, may establish branch banks in the municipality in which its principal office is located. Acts 1929, p. 215, § 1.

§ 2366 (6). Surplus and undivided profits defined.

The capital stock of a bank is not a liability that should be taken into account in determining the question of solvency or insolvency of a bank. *Manley v. State*, 166 Ga. 563, 566, 144 S. E. 170.

The liability of a bank to its stockholders is not an as-

set that the jury should take into consideration in determining whether the bank is insolvent or not. *Manley v. State*, 166 Ga. 563, 566, 144 S. E. 170.

SECTION 2

Department of Banking

§ 2366 (16). Assistant superintendent, examiners and clerks.

See notes to § 2366(71).

SECTION 6

Impairment of Capital

§ 2366(49). Assessment, how enforced.

This section substantially reenacts Code, § 3391, reducing the time within which the impairment shall be made good from ninety to sixty days. *Smith v. Mobley*, 166 Ga. 195, 199, 143 S. E. 116.

It is not a condition precedent to the right of the superintendent of banks to maintain a common-law suit to recover an assessment of a stockholder in an insolvent bank that the stockholder be given notice of the assessment as required in this section, which provides for the collection of the assessment by a summary execution. *Doster v. Mobley*, 38 Ga. App. 508, 144 S. E. 385.

The method of collecting an assessment against a stockholder of an insolvent banking corporation by a summary execution issued by the superintendent of banks against the stockholder, as provided in this section, is not exclusive but is cumulative only. An assessment so made may be collected by a common-law suit instituted by the superintendent of banks, suing as provided in the sections cited in paragraph 1 above. *Doster v. Mobley*, 38 Ga. App. 508, 144 S. E. 385.

SECTION 7

Taking Possession of Bank by Superintendent

§ 2366 (52). Suits, conveyance, purchase of property, extension and renewal.

Constitutionality.—This section does not violate article 3 of the constitution (Code, § 6437). *Shannon v. Mobley*, 166 Ga. 430, 143 S. E. 582, citing *Fite v. Henson*, 157 Ga. 579, 122 S. E. 412; *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

This section does not give to the superintendent of banks any authority to prosecute any cause of action which is vested by law in the bank or in its stockholders or the creditors thereof. That section is "in terms confined to such matters as relate to the assets of the bank as such, debts and liabilities due to the bank in its corporate capacity." *Hines v. Wilson*, 164 Ga. 888 (2), 139 S. E. 802. The liability sought to be enforced by these suits is neither an asset of the bank nor a liability due the bank in its corporate capacity. So we find no authority whatever for the superintendent of banks to bring these suits. *Mobley v. Sasser*, 38 Ga. App. 382, 384, 144 S. E. 151.

Former Law Not Repealed.—This section supra, did not expressly or impliedly repeal any authority conferred by the act of 1919 upon the superintendent of banks touching the question here involved. *Shannon v. Mobley*, 166 Ga. 430, 143 S. E. 582.

Causes of Action in Which Bank Has No Interest. — In *Hinton v. Mobley*, 167 Ga. 60, 62, 144 S. E. 738, it is said: "It is upon this principle that we decided the case of *Hines v. Wilson*, 164 Ga. 888, 139 S. E. 802, where we held that the use of the word "may" as employed in section 7a of the act of 1922, supra, (p. 65), authorized the superintendent of banks to sue for all debts due the bank, but did not in-

clude causes of action in which the bank had no interest, and where the recovery of damages for deceit would not inure to the benefit of the bank but accrue only to the individual who might have been defrauded and injured by the acts of an individual who happened to be an official of the bank, but was acting at the time he inflicted the injury wrongfully and fraudulently and without the scope of his duties."

Action against Directors Causing Insolvency.—Action lies by State superintendent, not by stockholders, against directors who caused insolvency of bank. *Hinton v. Mobley*, 167 Ga. 60, 144 S. E. 738.

In Whose Name Suit Brought.—A suit instituted by the superintendent of banks, under authority of this section, may be instituted by him for the bank in his own name as superintendent of banks. *Doster v. Mobley*, 38 Ga. App. 508, 144 S. E. 385.

Amendment to Proceed in Name of Bank.—The superintendent of banks is authorized to bring the present suit either in his own name in his official capacity, or in the name of the bank. Such a suit brought by the superintendent of banks in his own name is amendable so as to make the case proceed in the name of the bank. *Shannon v. Mobley*, 166 Ga. 430, 143 S. E. 582, citing *Anderson v. Bennett*, 160 Ga. 517, 128 S. E. 660.

Sale by Superintendent as Divesting Tax Lien.—The principles that liens for taxes are superior to all other liens; and that an execution sale does not divest such lien apply where a bank owning realty becomes insolvent and is placed in the hands of the superintendent of banks under § 2366(51), and the superintendent, in pursuance of an order granted by the judge of the superior court, makes sale of the realty and conveys the same to a purchaser while the lien of the taxes of the bank for the year in which the sale was made remains outstanding. In such case a purchaser from the superintendent of banks will take the property subject to be levied upon and sold for collection of taxes. Sections 2366(54) and 2366(56) do not prohibit the levy of lawful executions for taxes. *Stephens v. First Nat. Bank*, 166 Ga. 380, 143 S. E. 386.

§ 2366 (54). Effect of notice of possession.

See note to § 2366(52).

§ 2366(56). Notice of taking possession. — On taking possession of the assets and business of any bank, as in this Act authorized, the Superintendent of Banks shall forthwith give notice of such action to all banks and other persons or corporations holding or in possession of any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance, or clearance thereafter made, or liability thereafter incurred, against any of the assets of the bank, of whose assets and business the Superintendent shall have taken possession as aforesaid.

The superintendent shall also file and have recorded in the office of the clerk of the Superior court of the county in which the bank is located, and if the bank has a branch or branches in another or other counties, in such county or counties also, a certificate under his hand and the seal of the Department of Banking, wherein he shall set forth that the assets and business of the bank have been taken charge of by him for the purpose of liquidation, giving the date on which he took charge. A certified copy of said certificate shall be admissible in evidence without proof, as a duly recorded deed is admitted. Acts 1919, pp. 135, 155; 1927 pp. 195, 197.

See notes to § 2366(52).

Editor's Note.—The last paragraph of this section was added by the amendment of 1927.

§ 2366(57). Business resumed, how.—After the Superintendent of Banks has so taken possession of any bank, the Superintendent may permit such

bank to resume business upon such conditions as may be approved by him. When necessary, in order to make good an impairment of capital, the stockholders, with the approval of the superintendent, may levy a voluntary assessment on the stockholders as provided in section 7 of this article, the amount of the assessments be fixed by the superintendent. Acts 1919, pp. 135, 156; 1927, pp. 195, 198.

Editor's Note.—The last sentence of this section is new with the amendment of 1927.

§ 2366(58). Collections and sales, how made.

Confirmation of Sales.—Whether sales made under an order of the superior court at the instance of the superintendent of banks under this section should be confirmed is a matter within the sound legal discretion of the court. Such sales are never consummated until confirmed. *Wingfield v. Bennett*, 36 Ga. App. 27, 134 S. E. 840.

Status of the Court in Authorizing Sale. — The judge of the superior court, when passing upon an application of the superintendent of banks and in passing an order authorizing a sale of the assets of the bank by the superintendent as provided in this section is not administering the assets of the bank, and passes upon and adjudicates no rights of parties but is merely, under statutory authority, directing a State officer who is not an officer or receiver of the court, in the discharge of a statutory duty. This is true notwithstanding that the statute requires that before the passage of such order the bank be made a party to the proceedings, by proper notice issued by the court. Such an order of sale is not judicial, but is purely administrative or ministerial, and is therefore not a judgment of a court which can be reviewed by a writ of error. *Cochran v. Bennett*, 37 Ga. App. 202, 139 S. E. 428, and cases cited. *In re Union Bank*, 176 App. Div. 477.

"Assets" would ordinarily mean the property owned by the bank as a corporate entity, and would not include the statutory liability of stockholders, and while the word appears to have been used with this meaning in several places in the banking act, it is nevertheless given a larger significance in this section, for it is there provided that the individual liability of stockholders shall be an asset of the bank to be enforced by and through the superintendent. *Deariso v. Mobley*, 38 Ga. App. 313, 324, 143 S. E. 915.

It could hardly be doubted by any one that the "getting in" of the assets, including the making of collections on any liability, would be a matter which the superintendent could entrust to an agent. In fact, when we consider what may be the multitude of his duties, the necessity of acting through others in such matters would appear to be absolute. *Deariso v. Mobley*, 38 Ga. App. 313, 325, 143 S. E. 915.

§ 2366 (60). Superintendent may appoint agent.

Where an agent has been authorized by the superintendent to issue such executions, it is proper for him, in doing so, to sign them in the name of the superintendent by himself as agent. Under the agreed statement of facts, the trial court properly rendered judgment in favor of the plaintiff in *fi. fa.* on each ground of the affidavit of illegality. *Deariso v. Mobley*, 38 Ga. App. 313, 143 S. E. 915.

Under section 9 of article 7 of the banking act (Ga. L. 1919, p. 157) the superintendent may, under his hand and official seal, appoint an agent to assist him in liquidating and distributing the assets of any bank whose assets and affairs are subject to liquidation by him and may authorize such agent to perform any act connected with such liquidation and distribution that the superintendent himself could perform; and to that end may empower an agent to issue executions for the enforcement of the liability of the stockholders where they have failed to pay the same after due assessment and notice. *Deariso v. Mobley*, 38 Ga. App. 313, 143 S. E. 915. Compare *Mobley v. Marlin*, 166 Ga. 820.

§ 2366 (61). Attorneys, accountants, and assistants.

An averment in such an affidavit of illegality, that the execution "was not made on a legal assessment made by the superintendent of banks, as required by law," can be construed only as a charge that the assessment made by

the superintendent was in some way illegal, and is too general and uncertain to be basis for a verdict in favor of the defendant in *fi. fa.* *Mobley v. Goodwyn*, 39 Ga. App. 64.

§ 2366 (63). Inventory to be filed.

Cited in *Manley v. State*, 166 Ga. 563, 588, 144 S. E. 171.

§ 2366 (64). Notice to creditors and proof of claims.

Where in response to the notice required by this section, certain Florida banks filed with the superintendent of banks verified claims against the bank in the hands of the superintendent for liquidation, certified copies of such claims are admissible in evidence in any court of this State, when relevant, and such certified copies are primary evidence. *Manley v. State*, 166 Ga. 563, 144 S. E. 170.

§ 2366(66). Superintendent may reject claims or change rank.—If the Superintendent doubts the justice and validity of any claim or deposit or the priority therefor as claimed in the proof filed, he may either reject the same or change the rank or order of paying the same and serve notice of such rejection or change upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice, which shall be prima facie evidence thereof, shall be filed in the office of the Superintendent. Any action or suit upon such claim so rejected or changed as to rank, whether for the purpose of having said claim allowed or of establishing the rank or order of payment thereof must be brought by the claimant against the bank in the proper court of the county in which the bank is located, within ninety (90) days after such service, or the same shall be barred. Notice of the filing of such suit with a copy of the petition shall be given by the claimant to the Superintendent of Banks by registered mail at least ten days (10) before the suit shall be in order for trial. The Superintendent, if he so desires, may defend the suit in the name of the bank. Suits brought under this section shall be tried at the first term of the court. Acts 1919, pp. 135, 158; 1927, pp. 196, 198.

Editor's Note.—The provision in case the superintendent doubts the priority of the claim is new with 1927 amendment. By the amendment the superintendent may change the rank or order of paying the claim, and the rest of the section is so amended as to conform it to the last referred change. The last three sentences are also new with the amendment.

§ 2366(67) Objections to claims. — Objections to any claim or deposit not rejected or changed as to rank or order of payment by the Superintendent may be made by the party interested, by filing a copy of such objections with the Superintendent; and the Superintendent, after investigation, shall either allow such objections and reject the claims or deposit, or change the rank or order of payment thereof, and present such objections to the Superior Court of the county in which the bank is located, which court shall cause an issue to be made up and tried at the first term thereafter, as to whether or not such claim or deposit should be allowed and as to the proper rank or order of payment thereof. Acts 1919, pp. 135, 159; 1927, pp. 195, 199.

Editor's Note.—The reference to the change of the rank or order of claims throughout this section is new with the amendment of 1927.

§ 2366(70). Order of paying debts.—After the

payment of the expenses of liquidation, including compensation of agents and attorneys, and after the payment of unremitted collections, the order of paying off debts due by insolvent banks shall be as follows:

- (1) Debts due depositors.
- (2) Debts due for taxes, State and Federal.
- (3) Judgments.
- (4) Contractual obligations.
- (5) Unliquidated claims for damages and the like.

Provided, that nothing herein contained shall affect the validity of any security or lien held by any person or corporation. Acts 1919, pp. 134, 159; 1925, pp. 119, 129; 1927, pp. 195, 199.

Editor's Note.—By the amendment of 1927 the payment of unremitted collections are also made prior to the payment of other classes of claims enumerated. The amendment also changed the order of payment, and the number of the classes of claims enumerated. The proviso is new with the amendment.

Loan to Cashier.—The money loaned to the cashier is not a debt entitled to priority under class 5 [now 1] of this section, as a debt due by the bank as trustee or other fiduciary, or as a claim of like character. *Campbell v. Morgan County Bank*, 35 Ga. App. 222, 132 S. E. 648.

Where a trustee deposits funds of his *cetui que trust* in a bank and takes therefor a time certificate, bearing interest from the date to maturity, and the bank becomes insolvent, the holder of such certificate is not entitled to preferred payment thereof under the 3rd provision of this section. The bank does not become a fiduciary of like character as an executor, administrator, guardian, or trustee, by receiving such deposit from the trustee or another for the trustee, and issuing to the trustee a time certificate therefor. Such certificate of deposit creates the relation of debtor and creditor between the bank and the trustee; the title to the money so deposited immediately passes to the bank, and the credit of the bank is substituted for the money. *Cato v. Mixon*, 165 Ga. 345, 140 S. E. 376.

Under the facts appearing from the agreement creating the trust, and from the certificate of deposit, and the other aliunde allegations in the petition, the bank did not become either an express or implied trustee of the fund for which the certificate was issued for the beneficiary under this trust agreement. Deposits made by trustees, executors, administrators, assignees, auditors, public officers, and others serving as fiduciaries, are considered simply as general deposits; and if the bank in which they are placed fails to pay them, the beneficiaries have no peculiar claim or preference over other creditors. *Cato v. Mixon*, 165 Ga. 245, 140 S. E. 376.

This case is controlled by the ruling made by the Supreme Court in *Williams v. Bennett*, 158 Ga. 488, 123 S. E. 683. Here, as in the *Williams* case, the money sued for was not a general deposit, but was held by the bank under fiduciary relations between the parties, constituting it a trust fund to be applied to "a designated or specific purpose." As such, under paragraph 5 of section 19 of article 7 of the banking act (Ga. L. 1919, p. 159), as it then existed, it is entitled to priority of payment over general deposits which fall under paragraph 7 of that section and article, and the judgment setting up the claim should have established such priority. *Buckeye Oil Co. v. Citizens Bank*, 37 Ga. App. 421, 422, 140 S. E. 399.

Between Debts Due County and State.—Clearly, under the provisions of the act of 1919, which provided the order of the payment of debts at the time this bank was taken possession of by the superintendent, and by that act as amended by the act of 1925, debts due any county rank second, and are inferior in priority only to debts due the State of Georgia. *Bennett v. Wilkes County*, 164 Ga. 790, 139 S. E. 566.

§ 2366(71) Assessment of stockholders.

See notes to § 2366(180).

Section 20 of article 7 of the banking act approved August 16, 1919 (Ga. L. 1919, pp. 135, 160), which provides that after a stockholder in a bank which has been taken over for liquidation by the superintendent of banks has been given notice by mail of an assessment made against the stockholder, if the stockholder "so notified shall refuse or neglect to pay any such assessment within thirty days after the levy of such assessment and notice there-

of, the superintendent of banks shall issue an execution against such stockholder for the amount of such assessment," implies that the stockholder against whom the assessment has been made, and to whom the notice has been given by mail as required, shall be entitled to thirty days, exclusive of the date upon which the notice of assessment was given, within which to pay the assessment before an execution by the superintendent of banks can be legally issued against the stockholder. It follows, that, where an assessment against a stockholder was made by the superintendent of banks and the required notice was given on the 19th day of October, 1926, an execution for the enforcement of the assessment which was issued on November 18, 1926, was issued within the period of thirty days after the levy of the assessment and the giving of the notice, and therefore the issuance of the execution was premature, and therefore illegal. The judge of the superior court therefore properly sustained the stockholder's affidavit of illegality interposed to the levy made under the execution. *Civil Code* (1910), § 4, par. 8; *Knoxville City Mills v. Lovinger*, 83 Ga. 563, 10 S. E. 230; *Rusk v. Hill*, 117 Ga. 722, 45 S. E. 42; *Holt v. Richardson*, 134 Ga. 287, 67 S. E. 798; *Grooms v. Hawkinsville*, 31 Ga. App. 424, 120 S. E. 807; *Mobley v. Goodwyn*, 39 Ga. App. 64, 146 S. E. 78. Judgment affirmed. *Jenkins, P. J., and Bell, J., concur. Mobley v. Chamblee*, 39 Ga. App. 645, 148 S. E. 306.

Constitutionality.—A consideration and determination of the question whether the provision of this section is violative of the due-process clause of the fourteenth amendment of the Constitution of the United States being for decision by a full bench of six Justices, who are equally divided in opinion, the judgment of the lower court upon this point is affirmed by operation of law. *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

This section as amended does not violate paragraph 23 of section 1 of article 1 of the constitution of this State. *Coffin Bros. & Co. v. Bennett*, 164 Ga. 350, 138 S. E. 670.

In *Coffin Bros. & Co. v. Bennett*, 277 U. S. 29, 48 S. Ct. 422, it was held that this section did not deny due process of law.

Delegation of Authority.—Authority of the superintendent of banks to determine the stockholder's liability to depositors and collection thereof under this section as amended in 1925, cannot be delegated to agent by power of attorney authorized by sections 2366(60), (61), notwithstanding section 2366(74) and section 2366(16). *In re Giles*, 21 Fed. (2d), 536.

Option of Stockholder.—Under a proper construction together of articles 6 and 7 of the banking laws, stockholders of a banking company have the privilege of declining to levy assessments under article 6 to make good the impairment of the capital stock thereof after notice by the superintendent of banks, and of electing instead to allow the bank to be liquidated and to submit to an assessment made by the superintendent under article 7 of said banking laws. *Smith v. Mobley*, 166 Ga. 195, 143 S. E. 116.

Summary Executions.—Under this section, the notice of assessment is a demand on the stockholder for payment thereof in proportion to the amount of stock held by him, which he may satisfy at any time within thirty days, without any proceeding to enforce its payment. If he fails to make such payment within that period, it is the duty of the superintendent of banks to proceed to enforce payment by summarily issuing execution against the stockholder. The mailing of the notice of assessment is not the beginning of litigation, within the meaning of that word as used in the phrase, "with a view to pending litigation," in the *Civil Code*, § 5768. *Bennett v. Cox*, 167 Ga. 843, 146 S. E. 835.

Same—Signing Execution.—The signing of an execution under this section, is a clerical or ministerial act which can be delegated by the superintendent of banks. Properly construed, the act is broad enough in its terms to authorize the superintendent of banks to appoint an assistant superintendent of banks, or agent, to perform such duties as shall be assigned him by the superintendent. The superintendent can delegate to such assistant, or agent, the duty of issuing and signing executions in pursuance of assessments made by the superintendent. This authority may be exercised by signing such executions in his own official capacity, or by the agent affixing to them the official signature of the superintendent of banks and adding the word "by," and then adding his own official signature. *McCaskill v. Chattahoochee Fertilizer Co.*, 167 Ga. 802, 146 S. E. 830.

Where Liability Fixed by Charter.—Section 8 of the act of December 22, 1888, creating a special legislative charter for the Washington Exchange Bank, which section fixes the liability of stockholders of said bank, has not been re-

pealed or modified by subsequent legislation contained either in § 2270, or in §§ 2366(1) et seq. *Latimer v. Bennett*, 167 Ga. 811, 146 S. E. 762.

A stockholder in said bank, who had sold her stock prior to the failure of the bank and to its being taken over for liquidation by the superintendent of banks, but who had not had the transfer of the stock entered upon the books of the bank, as provided in section 6 of the act incorporating the bank, is liable to an assessment, under this section of the Code. *Latimer v. Bennett*, 167 Ga. 811, 146 S. E. 762; *Latimer v. Bennett*, 37 Ga. App. 246, 139 S. E. 570.

Remedy of Stockholder.—A stockholder in this bank, who is assessed on his stock by the superintendent of banks to pay its indebtedness, can by affidavit of illegality contest his or her liability for the assessment, the correctness of the estimate made by the superintendent of banks, or the amount of the assessment; and the ruling of the Court of Appeals to the contrary was erroneous. *Latimer v. Bennett*, 167 Ga. 811, 146 S. E. 762; *Latimer v. Bennett*, 37 Ga. App. 246, 139 S. E. 570; *Coffin Bros. & Co. v. Bennett*, 164 Ga. 350, 138 S. E. 670.

Where an execution was issued by authority of the superintendent of banks, to enforce the statutory liability of a stockholder, and where, upon a levy of the execution, the stockholder interposed an affidavit of illegality, allegations therein which in effect charged only that the estimate of the value of the assets as made by the superintendent under section 20 of article 7 of the banking act (Ga. L. 1919, p. 135) were not carefully made, or that such estimate and the assessment upon the stockholders were not made within the time specified in the act, were insufficient to present any defense against the execution.

There is no law requiring that executions to enforce the statutory liability of stockholders shall be issued within thirty days from the levy of the assessment and notice thereof. *Mobley v. Goodwyn*, 39 Ga. App. 64.

§ 2366(75). Unclaimed deposits and dividends.

—Where deposits or other claims against the bank are not filed within twelve months after the expiration of the date fixed by the superintendent for the presentation of claims against the bank, no dividend shall be paid thereon but dividends accruing on said claims shall be distributed as other assets of the bank, and where dividends are not accepted and collected within six months after they are declared, they shall become a part of the general fund of the bank and be distributed as other assets. In case of banks that were closed and being liquidated by the Superintendent before August 25, 1925, claims which were not filed within sixty days from the date of the approval of this act shall be forever barred, and all funds deposited or held to meet such claims, and any dividends which may have been declared but are not collected within such period of sixty days, shall become part of the general funds of the bank, and shall be distributed as other assets. Acts 1925, pp. 119, 132; 1927, 195, 200.

Editor's Note.—The provision as to the bar of claims not presented in time in case of banks closed and in liquidation before August 25, 1925, is new with the amendment of 1927.

SECTION 8

Incorporation of Banks

§ 2366(80). **Application for charter.**—Any number of persons not less than five (5) may form a corporation for the purpose of carrying on the business of banking, by filing in the office of the Secretary of State an application in writing signed by each of them, in which they shall state.

(3) The amount of its capital stock which shall not be less than twenty-five thousand

(\$25,000) dollars where located in a town or city whose population does not exceed three thousand according to the last preceding census of the United States, and not less than fifty thousand (\$50,000) dollars where located in a city or town whose population exceeds three thousand according to said census. Provided, however, this section shall not apply to banks whose capital stock is now fixed, so they shall not be required to increase the same. Acts 1927, 195, 200.

Editor's Note.—The amendment of 1927 changed the requirement as to the minimum amounts of the capital stock, and the population of places of establishment, which appear in the third clause of this section.

Illustration.—In *Mobley v. Hagedorn Construction Co.*, 168 Ga. 385, 391, 147 S. E. 890, it is said: "We are of the opinion that under the act of 1919 (Ga. L. 1919, pp. 164 et seq., Park's Code Supp. 1922, §§ 2269(a) et seq.; Michie's Code 1926, § 2366(80)) the Georgia State Bank, under the contract under review, assumed all the liabilities of the Bank of Chatsworth. It will be observed that by this contract the Bank of Chatsworth stripped itself of its assets, and it received no consideration therefor except the obligation of the Georgia State Bank to assume its liabilities."

§ 2366(86). Payment of capital.

Prior Law Construed.—In *Pearce v. Bennett*, 35 Ga. App. 415, 133 S. E. 278, construing Civil Code of 1910, section 2268, which permitted the board of directors to prescribe how any unpaid part of the capital stock should be paid in, it was held that where a subscriber for stock in such a bank had paid his pro rata of the minimum amount required to be paid in before the filing of the application for charter and the subscription contract did not provide otherwise, the remainder of his subscription was not due until the directors called for its payment, and the statute of limitations did not begin to run in his favor as to the unpaid installment until such condition was complied with. It will be noted that section 2268 of the Civil Code of 1910, which Bell, J., referred to in this case was repealed by Acts 1919, p. 135. See Editor's Note under section 2366(1) of the Code of 1926. Of course banks incorporated under the said section are still governed by that law instead of sections 2366(1)-(196) unless the right to change was reserved to the State in the charters of the individual Banks. *Dartmouth College case*. To ascertain whether such reservation was made in a given case recourse to the charter of the given bank must be had. Ed. Note.

SECTION 18

Liability of Stockholders

§ 2366 (139). Stockholders' liability, extent of.

See note to § 2366(2).

Citizens Bank transmitted \$5000 to Bankers Trust Company, its financial agent, to be placed "on call" with another bank or banks. The Trust Company, was also financial agent for a large number of banks, among which was Plains Bank. The Trust Company deposited the \$5000 in Fulton National Bank of Atlanta and to the credit of Plains Bank and advised Citizens Bank, "covering call funds," that "we deposit \$5000 with Plains [Bank], Ga." Bankers Trust Company also advised Plains Bank, "Covering call funds," that "we deposit \$5000 with Fulton Nat. Bank. From—Deposited \$5000 by Citizens Bank, Waynesboro, Ga." Held: Under the facts of the case, the transaction was not a "deposit" with Plains Bank, as contemplated by the General Assembly in providing that shareholders in banks may be assessed for the payment of depositors. *Citizens Bank v. Mobley*, 166 Ga. 543, 144 S. E. 119.

"The stockholders of this bank are not individually liable to its depositors under the act of 1893 (Civil Code of 1910, § 2270), as this bank did not exercise the privilege granted by this act of amending its charter so as to embrace therein this provision; nor are they thus liable under §§ 2366(139) et seq., as that act imposes this liability only upon stockholders of banks chartered thereunder.

"This liability of the stockholders is one in favor of all the creditors of the bank, and not in favor of depositors alone. *Bennett v. Wilkes County*, 164 Ga. 790, 139 S. E. 566.

Cited in *Mobley v. Robinson* (Ga.), 30 Fed. (2d) 339.

§ 2366(140). Exception for trustees and other fiduciaries.

Applicability to Parent of Minor.—One who buys stock in a bank, and has it entered on the books of the bank in his own name as guardian for his minor child, is himself, as between him and the bank, the owner of the stock, and the provisions of this section are not applicable. Where the bank has been taken over by the superintendent of banks under the authority of the banking laws, such person is individually liable for an assessment made against him as stockholder by the superintendent of banks. *Rosenberg v. Bennett*, 35 Ga. App. 86, 132 S. E. 119.

Applied in *Longino v. Bennett*, 39 Ga. App. 89, 90, 146 S. E. 324.

§ 2366(141). Liability of stockholder after transfer of stock.

See note to § 2366(142).

Failure to Enter Transfer on Banks.—Where a stockholder in a bank, individually liable under the charter, transfers his stock, but fails to have the transfer entered upon the books of the bank, and fails to give to the bank written notice thereof, as provided by the banking act, he is not exempt from liability. *Candler v. Mobley*, 37 Ga. App. 259, 139 S. E. 732.

Section 8 of the act of 1888 (Ga. L. 1888, p. 73), which fixes the liability of stockholders of the Washington Exchange Bank, has not been repealed or modified by subsequent legislation contained either in the act of 1893 (Civil Code of 1910, § 2270) or in the banking act of 1919 (Ga. L. 1919, p. 135), or otherwise. *Latimer v. Bennett*, 37 Ga. App. 246, 139 S. E. 570. See note to § 2366(71).

Applied in *Longino v. Bennett*, 39 Ga. App. 89, 90, 146 S. E. 324.

§ 2366(142). Liability when bank fails.

Effect of Liability of Former Stockholder.—The present owner of stock, against whom such an assessment is made, can not defeat liability therefor upon the ground that under the provisions of this and section 2366(141), a former stockholder from whom he purchased the stock within six months prior to the date of the failure of the bank may be liable for an assessment thereon. The right to enforce the assessment against the former stockholder is in the superintendent of banks, and not in the present stockholder. *Rosenberg v. Bennett*, 35 Ga. App. 86, 132 S. E. 119.

Effect of Defective Title of Former Stockholder.—A present stockholder against whom an assessment has been made under the authority of this law, can not defend against such assessment upon the ground that the former stockholder from whom he purchased the stock had no title. *Rosenberg v. Bennett*, 35 Ga. App. 86, 132 S. E. 119.

SECTION 19

Regulation of the Business of Banking

§ 2366(148). Qualification of directors.—Every director must, during his whole term of service, be a citizen of his [this] State or reside within 25 miles of the city or town in which the bank is located, and at least three fourths of the directors must be residents of the city or town in which the bank is located or within twenty-five miles thereof, and must continue so to reside during their continuance in office. Every director must own in his own right and unpledged at least ten shares of the capital stock of the bank of which he is a director, upon which all installments which are due shall have been paid in full, unless the capital of

the bank shall not exceed twenty-five thousand dollars, in which case he must own at least five shares of such stock. Any director who ceases to be the owner of the number of shares herein required, or who pledges the same, or fails to pay any installment thereon when the same becomes due or who becomes in any other manner disqualified, shall vacate his place as a member of the board. Provided, that this section shall not apply to directors in office at the date this act takes effect, and said directors shall be qualified to succeed themselves as often as they may be re-elected without reference to the provisions of this section. Acts 1919, pp. 135, 197; 1927, pp. 195, 201.

Editor's Note.—Prior to the amendment of 1927 directors of banks with a capital stock of between \$15,000 and \$50,000 and directors of banks with a capital stock of over \$50,000 were required to own two and five shares of the capital stock, respectively. All the other provisions of the section, except the provision as to vacating the office of directors which remains the same, are new with the amendment.

§ 2366(151). Semi-annual examinations by directors.—It shall be the duty of the board of directors of every bank, at least once in each six (6) months, to count the cash and examine fully into the books, papers, and affairs of the bank of which they are directors, and particularly into the loans and discounts thereof, with the special view of ascertaining the value and security thereof, and the collateral security, if any, given in connection therewith, and into such other matters as the Superintendent of Banks may require. Such directors shall conduct such count and examination by a committee of at least three (3) of its members; and shall have the power to employ certified public accountants, or other expert assistance in making such examinations, if they deem the same necessary. Within ten (10) days after the completion of each of such examinations, a report in writing thereof, sworn to by the directors making the same, shall be made to the board of directors, which report shall be spread upon the minutes of said board; and the original thereof shall be placed on file in said bank, and a duplicate thereof filed with the Superintendent of Banks. Provided, however, that in lieu of the semi-annual examination of the directors, such semi-annual examination may be made by accountants, approved by the Superintendent of Banks; and provided, that any bank which fails to transmit to the Superintendent of Banks, within ten (10) days after the completion of the same, a copy of the report made by such board of directors or such accountants shall be subject to the same penalty as is provided by § 2366(44) for failure to make and transmit its report in response to call of the Superintendent of Banks. Acts 1919, pp. 135, 193; 1922, p. 67; 1927, pp. 195, 198.

Editor's Note.—The provision at the beginning of the second sentence as to conducting the counts by a committee, which formerly was merely permissive, was made mandatory by the use of word "shall" in place of "may," by the Act of 1927.

§ 2366 (157). Borrowing for personal use by officers and employees prohibited except by permission of directors.

A settlement of the indebtedness represented by the notes,

by an acceptance of property by the bank from the makers in payment of the indebtedness, amounts to a settlement and discharge of the indebtedness, and to a release of the obligors under the contract of indemnity. This is true notwithstanding some of the obligors may have been members of the board of directors, or consented to the settlement provided, in so doing they committed no fraud on the bank. If the settlement was made bona fide and the bank received full value in payment of the indebtedness, there was no fraud as against the bank upon the part of the directors consenting thereto, who were parties to the contract of indemnity, and they therefore, under such circumstances, would not be estopped from setting up the settlement as a release of their liability under the contract of indemnity. *Ruffner v. Sophie Mae Candy Corporation*, 35 Ga. App. 114 (4), 132 S. E. 396. *Walton County Bank v. Staunton*, 38 Ga. App. 591, 144 S. E. 815.

If, the property received by the bank in settlement of the indebtedness represented by the notes was not reasonably worth the amount of the indebtedness, its acceptance by the officers of the bank in full settlement of the indebtedness, if not done bona fide and in the interest of the bank, amounted to a fraud upon the bank; and the guarantors upon the contract of indemnity, who were directors of the bank, unless they were not responsible for the contract of settlement, would be estopped from setting up the settlement in discharge of their obligations on the contract of indemnity. *Walton County Bank v. Stanton*, 38 Ga. App. 591, 144 S. E. 815.

Applied in *McClure v. Farmers & Merchants Bank*, 39 Ga. App. 753, 758, 148 S. E. 341.

§ 2366(159). Loans by bank, limit of.—No bank shall be allowed to lend to any one person, firm, or corporation more than twenty (20) per cent of its capital, and unimpaired surplus. And no loan shall be made in excess of ten (10) per cent of the capital and surplus, except upon good collateral or other ample security and with the approval of a majority of the directors, or of a committee of the board of directors, authorized to act, which approval shall be evidenced by the written signature of said directors or the members of said committee. In estimating loans to any person, all amounts loaned to firms and partnerships of which he is a member shall be included: Provided, however, that a bank may buy from or discount for any person, firm, or corporation, bills of exchange drawn in good faith against actually existing values, or commercial or business paper actually owned by the person negotiating the same, in addition to loans directly made to the person, firm, or corporation selling the same, such purchase or discount not to exceed (20) per cent of the capital and surplus, to be approved in writing by a majority of the directors, or by a committee of such board authorized to act; and provided, that the limit of loans herein fixed shall not apply to bona fide loans made upon the security of agricultural, manufactured, industrial products or live stock having a market value and for which there is ready sale in the open market, title to which by appropriate transfer shall be taken in the name of the bank, and which shall be secured by insurance against loss by fire, with policies made payable to the bank, where no more than eighty (80) per cent of the market value of such products shall be loaned or advanced thereon. In all such cases a margin of twenty (20) per cent between the amount of the loan and the market value of the products shall at all times be maintained (except where products are intended for immediate shipment); and the bank shall have the right to

call for additional collateral when the difference between the market value and the amount loaned shall be less than twenty (20) per cent, and in the event of the failure to comply with such demand, to immediately sell all or any part of such products in the open market and pay the amount of the loan and the expenses of sale, and the balance to the borrower; and provided, that the limit herein fixed shall not apply to loans fully secured by bonds or certificates of indebtedness of the United States or of this State, or of the several counties, districts, or municipalities thereof which have been duly and regularly validated as provided by law. Liabilities arising to the makers and indorsers of checks, drafts, bill of exchange, received by the bank on deposit, cashed, or purchased by it, shall not in any way be considered as borrowed money or loans. It shall be the duty of the Superintendent of Banks to order any loans in excess charged to profit and loss, provided in his opinion such excess is not well secured; and if such reduction shall not be made within thirty (30) days after such notification, to proceed as in other cases provided for violation of the orders of the Superintendent. Acts 1919, pp. 105, 197; 1922, pp. 88, 70; 1927, p. 201.

Editor's Note.—By the amendment of 1927 the phrase "not to exceed twenty (20) per cent of the capital and surplus" with regard to purchases referred to in the first part of the proviso, was substituted for the phrase "if in excess of ten (10) per cent of the capital and surplus."

Cited in *Manley v. State*, 166 Ga. 563, 583, 144 S. E. 170.

§ 2366 (160). Liability of directors for allowing loans exceeding limit.

The defendant in execution having failed to establish by proof the allegation in his affidavit of illegality, that the assistant superintendent of banks had no authority to issue the execution, which was signed "T. R. Bennett, Superintendent of Banks, by E. A. Thompson, Asst. Superintendent of Banks of the State of Georgia," and this being the only ground of illegality urged, the trial judge erred in directing a verdict for the defendant in execution. *Hansard v. Pool*, 39 Ga. App. 109, 147 S. E. 153.

§ 2366 (164). Certificates of deposit.

The purpose and effect of this section is to prevent a bank from pledging its credit and increasing its liability to depositors by trading its certificates of deposit for any instrument not the equivalent of cash. But it will not be taken that a bank has violated the section upon its merely being made to appear that a certificate of deposit has been issued to a customer in an amount representing the net proceeds of a note discounted for the depositor upon the same date, since the presumption would be that the discount of the note was bona fide and independent of any condition or understanding that its purchase price would be discharged by the customer's acceptance of a time certificate of deposit. *White County Bank v. Clermont State Bank*, 37 Ga. App. 268, 140 S. E. 676.

§ 2366(169). Purchase of stocks and investment securities.—No bank shall subscribe for, purchase, or hold stock in any other bank, except stocks in the Federal Reserve Bank of Atlanta, necessary to qualify for membership therein, nor in any other corporation unless the same shall have been transferred to it in satisfaction of a debt previously contracted, or shall have been purchased at a sale under a power contained in a note or other instrument by which it was pledged to the bank or under

a judgment or degree in its favor, and all such stock shall be disposed of by the bank within six months, unless the Superintendent of Banks shall extend the time for good cause shown. Nor shall a bank purchase or hold any bonds or debentures except such as are classed as investment securities, and the buying and selling of such securities shall be limited to buying and selling without recourse marketable obligations upon which there has never been a default, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures, commonly known as investment securities, under such regulations as may be prescribed by the Superintendent of Banks. The total amount of such investment securities shall at no time exceed 25 per cent. of the capital and unimpaired surplus of such bank; but this limitation as to the amount shall not apply to obligations of the United States, of this State, or of the several counties, districts, or municipalities thereof which have been validated as provided by law. Nothing in this section is to be construed as applying to savings banks doing a savings business only. Provided that this section shall not apply to securities actually owned at the date Act of 1919 became effective. Provided, further, that any bank may subscribe for, or purchase, stock in an agricultural credit corporation duly organized under the laws of this State having authority to make loans to the farmers of this State for agricultural purposes and to re-discount the same with the Intermediate Credit Bank of Columbia, but no bank shall subscribe for or purchase stock in more than one such corporation, nor invest therein more than ten per centum of its capital, and no such subscription or purchase shall be made until first approved by the Superintendent of Banks. Acts 1924, p. 76; 1919, pp. 135, 201; 1927, pp. 195, 203.

Editor's Note.—Save the last proviso, all of the provisions of the section were changed by the amendment of 1927. The changes effected are so versatile as to render it impossible to point them out by specific description, and calls for a comparison of the two sections.

§ 2366 (180). Lien on bank's assets when checks are not remitted.

K filed his claim against the Trust Company, based on the checks which the Trust Company had given to him, and claiming a lien on the Trust Company's assets under this section. Shortly thereafter he transferred this claim to the Fulton National Bank. The State superintendent of banks rejected to claim; and K, for the use of the bank, brought this suit to establish the claim under section 2366(71), and at the same time to enjoin the superintendent from paying out the funds of the Trust Company until the question could be determined. Held, that the court erred in refusing an injunction, inasmuch as the petitioner was entitled under the facts, to assert the lien claimed. *Kuniansky v. Mobley*, 167 Ga. 852, 146 S. E. 898.

§ 2366 (185). Payment of deposit in two names.

Effect upon Title to Deposit.—This section has reference to the liability of the bank as to a joint deposit, making it lawful for the bank to pay either party under such circumstances. It does not affect the right of the property as between the parties; that is, between the depositor and the third person claiming the deposit. It has no applicability to the title to the money as between the depositor and the third party. *Clark v. Bridges*, 163 Ga. 542, 136 S. E. 444.

§ 2366 (188). Deposit by agent, trustee or other fiduciary.

See § 2366(70).

§ 2366(190). Forged or raised checks.

Applicability to Signing by Unauthorized Agent.—The expression "forged check," as used in this section applies only to a check created as a result of a criminal act of forgery, and does not apply to a check to which one's name as maker or drawer is signed by another, who purports to act as the agent for the maker or drawer, although no such authority exists. *Samples v. Milton County Bank*, 34 Ga. App. 248, 129 S. E. 170.

Under the undisputed facts the plaintiff is not, as a matter of law, estopped, irrespective of the provisions of this section, from repudiating the act of the alleged agent in signing the plaintiff's name to the checks without authority. *Samples v. Milton County Bank*, 34 Ga. App. 248, 129 S. E. 170.

Excuse for Failure to Give Notice.—The effect of the ruling in *Citizens, etc., Bank v. Ponsell*, 33 Ga. App. 193, 125 S. E. 775, was that the trial court would not have been authorized to hold the reasons assigned by the plaintiff in exculpation of her failure to notify the defendant bank of the forgeries, within 60 days, as required by this section were not inadequate as a matter of law. That ruling did not go to the extent of holding that the circumstances pleaded in extenuation of such failure on the part of the plaintiff were necessarily such as would relieve her from the penalty prescribed. While it is true that the statute charges the depositor with a duty of notifying, it does not undertake to say what facts or circumstances, if any, would be sufficient to obviate the penalty of such dereliction. *S. C.*, 35 Ga. App. 460, 133 S. E. 351.

It is for the jury to say whether the facts pleaded and proved by the plaintiff, in exculpation of her dereliction, were such as would absolve her from the penalty prescribed. Consequently, the overruling of the demurrer to the petition does not mean that the plaintiff is absolutely entitled to recover if she proves her case as laid; for a general demurrer should be overruled in an action based on facts and circumstances justifying the plaintiff's admitted negligence when the jury, from the facts alleged, would be authorized to infer a justification for negligence, though they would not be bound to do so. See *McDuffie v. Ocean Steamship Co.*, 5 Ga. App. 125, 129, 62 S. E. 1008. *Ponsell v. Citizens, etc., Bank*, 35 Ga. App. 460, 133 S. E. 351.

§ 2366 (192). Transfer after or in contemplation of insolvency.

Under this section of the banking act the payment by the bank of money which is on general deposit to the depositor is the payment of assets of the bank to a creditor; and when made after the insolvency of the bank, and with a view by the bank of preventing the application of the assets in the manner prescribed by the banking act, or with a view by the bank of preferring the depositor over other creditors, the payment is, under the terms of the act, "null and void," if the payment is made within three months prior to the failure of the bank. It is not essential to the invalidity of the payment that at the time of payment the depositor to whom the money is paid shall have knowledge that the bank is insolvent. *Twiggs County Bank v. McCallum*, 39 Ga. App. 306, 147 S. E. 129.

§ 2366(194). Payment of deposit of deceased depositor.—Upon the death of any person intestate, having a deposit in a bank of not more than three hundred no/100 (\$300.00) dollars, such bank shall be authorized to pay over such deposit: (a) to the husband or wife of the depositor; (b) if no husband or wife, to the children; (c) if no children, to the father if living; if not, to the mother of the depositor; (d) if no children or parent, then to the brothers and sisters of the depositor. The receipt of such person or persons shall be a full and final acquittance to the bank and relieve it of all liability to the estate of said deceased depositor or the representative thereof should one be appointed. Such deposit shall be exempt from

the process of garnishment. Acts 1919, pp. 135, 210; 1927, pp. 195, 204.

Editor's Note.—Prior to its amendment in 1927, this section applied to deposits not exceeding one hundred dollars. The amendment extended its application to deposits of three hundred dollars and less. The provision as to the exemption of the deposit from process of garnishment is new with the amendment.

§ 2366(195A). Stale checks.—Where a check or other instrument payable on demand at any bank or trust company doing business in this State is not presented for payment within six months from the date thereof, the same shall be regarded as a stale check, and the bank or trust company upon which the same is drawn may refuse payment thereof unless expressly instructed by the drawer or maker to pay the same, and no liability shall be incurred to the drawer or maker for dishonoring the check or other instrument by such non-payment. Acts 1927, pp. 195, 204.

§ 2366(195B). Stop-payment orders to be renewed.—No revocation, countermand, or stop-payment order, relating to the payment of any check or draft against an account of a depositor in any bank or trust company doing business in this State, shall remain in effect for more than ninety (90) days after the service thereof on the bank, unless the same be renewed, which renewals shall be in writing and shall be in effect for not more than ninety (90) days from the date of the service thereof on the bank or trust company, but such renewals may be themselves renewed from time to time. All notices affecting checks or drafts of any bank or trust company, upon which revocation, countermand, or stop-payment orders have heretofore been made, shall not be deemed to continue in effect for more than ninety (90) days from the date of the approval of this Act, unless renewed in writing, which renewal shall not continue in effect for more than ninety (90) days from the date of the service thereof on the bank or trust company. Acts 1927, pp. 195, 205.

SECTION 20

Operation and Effect of Act

§ 2366(196A). Short title.—The Act approved August 16, 1919, entitled "An Act to regulate banking in the State of Georgia; to create the Department of Banking of the State of Georgia, to provide for the incorporation of banks, and the amendment, renewal, and surrender of charters; to provide penalties for the violation of laws with reference to banking and the banking business; and for other purposes," and the several Acts amendatory thereof, shall be referred to collectively as "The Banking Law." Acts 1927, pp. 195, 205.

§ 2366(196B). Venue of suits; service.—All suits against the Superintendent of Banks, arising out of the liquidation of insolvent banks, shall be brought in the county in which such

bank had its principal place of business, and service may be had on the Superintendent by serving such suit and process on the liquidation agent in charge of the affairs of the said bank, or, if there be none, on any former officer of said bank; provided, however, that in all such suits a second original shall be served on the Superintendent of Banks. Acts 1927, pp. 195, 206.

ARTICLE 4

Insurance Companies

SECTION 1

Incorporation of Insurance Companies

§ 2409(a). Park's Code.

See § 2409(1).

§ 2409(1). Superseded by §§ 2409(2)-2409(6).

§ 2409(2). Authorized investments of insurance companies.—Every insurance company organized and doing business by virtue of the laws of this State shall have authority to invest its money and assets in the following securities, to wit:

(a) Any and all bonds or securities issued by the United States of America, the District of Columbia, of any State of the United States, or any county or city therein; bonds of any township or school district therein; bonds issued by the Federal Land Banks under provisions of the Act of Congress of the United States of America of July 17, 1916, its amendments and supplements.

(b) Loans secured by any of the class of securities specified in (a) hereof.

(c) Loans secured by first liens on improved real estate in any of the States of the United States of America, not exceeding fifty (50%) per cent. of the value of said property.

(d) Loans on policies issued by the insurance company, not exceeding the reserve on such policies.

(e) A building for home-office purposes; provided that no company shall hereafter invest in such building unless its assets exceed \$100,000.00, and that such company shall not invest more than twenty-five (25%) per cent. of its assets in such a building; and provided further, that any such investment in a building for home-office use shall first be approved by the Insurance Commissioner.

(f) Evidence of indebtedness which may be purchased or discounted by Federal Reserve Banks.

(g) Investment securities, that is, marketable bonds, notes, and/or debentures, evidencing indebtedness of solvent persons or corporations, which, under the regulations of the Comptroller of the Currency of the United States, national banks may buy and deal in.

(h) Bonds and debentures of any solvent rail-

road, street-railway, or other public-utility corporation, or industrial corporation, on which no default of interest has occurred, when and if secured by a mortgage or deed of trust covering physical assets or securities of ample value to exceed the indebtedness secured.

(i) Preferred stocks of solvent corporations, where at the time of acquisition the equity of all preferred stock outstanding in the assets of the issuing corporation including the issue in which the investment is made is more than twice the amount of such preferred stock, and the earnings applicable to dividends on such preferred stock have, for two consecutive years prior to the date of acquisition, exceeded twice the dividend requirements.

(j) Common stocks of solvent railroads, street-railways, and other utility corporations and industrial corporations which are listed on an established exchange, where, prior to the date of acquisition of the stock, the company issuing such stock had maintained and paid dividends thereon for three consecutive years, and the current earnings of such company issuing such stock have been sufficient in each of such three consecutive years to fully pay the dividends.

(k) Promissory notes amply secured by pledges of securities in which the company is authorized to invest its funds. Acts 1929, p. 274, § 1.

§ 2409(3). Approval by Insurance Commissioner.—Investments in the classes of securities defined in the preceding section, except as to a building for home-office purposes, may be made by insurance companies without the approval of the Insurance Commissioner of Georgia, and that all other investments of funds by insurance companies in other classes of securities than those specified in section 1 of this Act shall only be made when the approval of the Insurance Commissioner of Georgia is first obtained. Acts 1929, p. 275, § 2.

§ 2409(4). Investment in more than 10% of securities of a single company or individual not allowed.—No insurance company organized and doing business by virtue of the laws of this State shall acquire or hold more than ten (10%) per cent of the securities of any single corporation; nor shall more than ten (10%) per cent of the assets of any insurance company be invested in the securities of any single company or in securities issued by any single individual. Acts 1929, p. 276, § 3.

§ 2409(5). Required investments.—Every insurance company organized and doing business by virtue of the laws of this State shall, to the extent of the paid-in outstanding capital stock of such insurance company, if it be a stock corporation, keep its funds and assets invested in the classes of securities defined and described in subparagraph (a), (b), (c), (d), (e), (f), and (h) of section 2409(2). Acts 1929, p. 276, § 4.

§ 2409(6). Authority to sell and buy.—Such insurance companies organized and doing business by virtue of the laws of this State may also sell,

assign, transfer, and convey, either with or without warranty, or either with or without recourse upon it, as it may prefer, any real estate, personal property, bond, note, mortgage, deed of trust, deed to secure debt, or other form of property or securities in which it may have invested its moneys or its assets, or made loans as allowed by law, and may also buy and sell any realty that may be necessary for the protection of any loan such insurance company may lawfully make. Acts 1929, p. 276, § 5.

SECTION 2

Insurance Companies, How Authorized to Do Business

§ 2415. License, how obtained.—Before said commissioner shall issue such license, such insurance company must fully comply with all of the provisions of this article, and file with said insurance commissioner a statement under oath of its president and secretary, specifying—

First. The name and locality of the company.

Second. The condition of such company on the thirty-first day of December then next preceding, if such company was engaged in business on said date; and if not so engaged on said date, then on the date when said company began to do business, exhibiting the following facts and items in the following form, namely:

1. The amount of the capital stock of the company, and what part of the same has been paid in cash, and what part is in notes of the stockholders, and how such notes are secured.

2. The property or assets held by the company, specifying—

(1) The value, as near as may be, of the real estate held by such company; if encumbered, to what amount.

(2) The amount of cash on hand and deposited in banks to the credit of the company.

(3) The amount of cash in the hands of agents and in the course of transmission.

(4) The amount of loans secured by bonds and mortgages on real estate.

(5) The amount of other loans, and how secured.

(6) The amount of bonds of this State, of other States in United States, and of any stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock.

(7) The amount of interest actually due and unpaid.

(8) The amount of premium notes on hand upon which policies have been issued.

(9) The amount of all other assets, real and personal, not included hereinbefore.

Third. The liabilities of the company, specifying—

1. The amount of losses due and yet unpaid.

2. The amount of claims for losses resisted by the company.

3. The amount of losses not yet due, including those reported to the company on which no action has yet been taken.

4. The amount of dividends declared and due and remaining unpaid.
 5. The amount of dividends declared but not yet due.
 6. The amount of money borrowed.
 7. The amount of all other claims against the company.
 8. The amount of reserve for reinsurance.
- Fourth. The income of the company during the preceding year specifying—
1. The amount of the cash premiums received.
 2. The amount of notes received for premiums.
 3. The amount of interest money received.
 4. The amount of income received from other sources.
- Fifth. The expenditures during the preceding year, specifying—
1. The amount of losses paid during the year.
 2. The amount of dividends paid during the year.
 3. The amount of expense paid during the year, including fees and commissions to agents and officers of the company.
 4. The amount paid in taxes.
 5. The amount of all other payments and expenditures.
- Sixth. The greatest amount insured in any one risk, and the total amount of insurance outstanding.
- Seventh. A certified copy of the Act incorporating the company. Acts 1929, p. 163, § 1.

SECTION 6

Agents of Insurance Company

§ 2446. (§ 2057). Service on non-resident companies.

See note to § 2563.

Applied in *Export Ins. Co. v. Womack*, 165 Ga. 815, 142 S. E. 851; *Export Ins. Co. v. Womack*, 38 Ga. App. 75, 143 S. E. 151.

SECTION 10

Fire Insurance Contracts

§ 2470. (§ 2089.) Contract of fire-insurance.

Entire Contract to Be Written.—This section requires the entire contract to be in writing, and a memorandum sufficient to satisfy the statute of frauds will not always do. *Coffin v. London, etc., Ins. Co. (Ga.)*, 27 Fed. (2d), 616, 617.

Delivery.—The rule of this section is stated in *Home Ins. Co. v. Head*, 35 Ga. App. 143, 132 S. E. 238.

Where an insurance company has accepted an application for insurance and has issued the policy, actual delivery is not essential to the consummation of a contract of insurance, unless expressly provided for in the application or the policy. See *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. R. 134. Where both the application and the policy are silent as respects actual delivery of the policy being essential to a consummation of the contract, the contract becomes consummated upon the retention by the company of the notes and the issuance of the policy and mailing it to its local agent for delivery to the applicant. *Tarver v. Swann*, 36 Ga. App. 461, 137 S. E. 126.

Same—Parol Agreement with Agent.—Where an application for insurance, which, upon the consummation of the

contract of insurance, became a part of the contract, provided that the company should “not be bound by any act done or statement made by or to any agent, or other person, which is not contained in this application,” an agreement not contained in the application or the policy, made between the applicant and the local agent, when the application and notes were signed, to the effect that the contract of insurance would not be consummated until actual delivery of the policy to the applicant, and that upon failure to make such actual delivery the applicant would not be bound upon the notes, did not become part of the contract. *Tarver v. Swann*, 36 Ga. App. 461, 137 S. E. 126.

§ 2471. Policies must contain the entire contract.

Necessity of Attaching Copy of Application.—See *Couch v. National Life, etc., Ins. Co.*, 34 Ga. App. 543, 130 S. E. 596; *Interstate Life, etc., Co. v. Bess*, 35 Ga. App. 723, 134 S. E. 804, citing and following the paragraph set out under this catchline in the Georgia Code of 1926.

Effect of Attaching Copy of Application.—Where, in conformity with the requirements of this section the application is attached to the policy and by the terms of the contract is made a part thereof, and where the authority of the medical examiner is limited, as in the contract before us, the beneficiary, in suing upon the policy, can not impeach the application as thus integrated therein. If the application falls, so does the policy, and in founding her action upon the policy she is committed to the proposition that the answers were made by the insured as set forth in the application. This rule is not changed by the fact that the plaintiff fails to include the application in the copy of the policy attached as an exhibit to the suit. *Metropolitan Life Ins. Co. v. James*, 37 Ga. App. 678, 682, 141 S. E. 500.

§ 2472. (§ 2090.) Interest of assured.

Test of Insurable Interest.—While, under the section, an insurable interest is defined as “some interest in the property or event insured,” and a “slight or contingent interest is sufficient, whether legal or equitable” such an insurable interest is not to be taken as synonymous with the sole and unconditional ownership required by the terms of the policy in the instant case. Nor does the rule as to an insurable interest dispense with the contractual requirement as to liens upon the property constituting the subject matter of the risk. *Alliance Ins. Co. v. Williamson*, 36 Ga. App. 497, 499, 137 S. E. 277.

§ 2475. (§ 2093.) Construction.

Usages and Customs.—See *Macon County Ass’n v. Slapey*, 35 Ga. App. 737, 741, 134 S. E. 834, following the paragraph under this catchline in the Georgia Code of 1926.

General Rules of Construction.—The rights of the parties are to be determined by the terms of the policy, so far as they are lawful. The language of the contract should be construed as a whole, and should receive a reasonable construction, and not be extended beyond what is fairly within the terms of the policy. Where the language is unambiguous and but one reasonable construction of the contract is possible, the court must expound it as made. *Cato v. Aetna Life Insurance Co.*, 164 Ga. 392, 398, 138 S. E. 787, citing *Yancey v. Aetna Life Insurance Co.*, 108 Ga. 349, 33 S. E. 979; *Wheeler v. Fidelity, etc., Co.*, 129 Ga. 237, 58 S. E. 709.

§ 2479. Application, good faith.

Representations as to previous health of the insured are in general material, when not only life, but future health, are to be insured. Even though a misrepresentation relates to a time several years prior to the application, it is material, unless it is very clear that the ill health was due to a transient cause, and left no bad effects. Mental derangement, because of its obscurity, especially might well be traced back indefinitely. *Pacific, etc., Ins. Co. v. Manley (Ga.)*, 27 Fed. (2d), 915.

Statements as to consultations with and treatment by physicians are always considered material, because the means are thereby furnished for the company to check the information and good faith of the applicant as to the nature and extent of his ailments. So it is ground for cancelling a life insurance policy that insured in his application stated that he had not been treated by physicians for an ailment, where it appeared that six years before

he had had a condition of acute mania, had been confined in hospitals and been treated for recurrent severe headaches. *Pacific, etc., Ins. Co. v. Manley (Ga.)*, 27 Fed. (2d), 915.

Good Faith No Defense to Actual Falsity.—Under this section and §§ 2480 and 2499 the actual falsity of representations materially affecting the nature and character of risk void a policy of life insurance, independently of intentional deceit. Good faith is not a reply to actual falsity, unless the representation is made on information from others, and the insurer is so informed at the time. the assured proposes to contract on a basis of fact presented by him to the insurer. If that basis is incorrect in a material respect, there is no binding contract. The case is not unlike that of a sale on representations, which, if materially untrue, though made in good faith, avoid the sale under § 4113. *Pacific, etc., Ins. Co. v. Manley (Ga.)*, 27 Fed. (2d), 915, 916.

§ 2480. (§ 2098.) Effect of misrepresentation.

See notes to § 2479.

Where Capable of Two Constructions.—See *Macon County Ass'n v. Slappey*, 35 Ga. App. 737, 741, 134 S. E. 834; *Johnson v. Mutual Life Ins. Co.*, 154 Ga. 653, 115 S. E. 14, following paragraph under this catchline in Georgia Code of 1926.

Misrepresentation in Application Not in Writing Attached to Policy.—In *Interstate Life, etc., Co. v. Bess*, 35 Ga. App. 723, 726, 134 S. E. 804, it was said by Bell, J., "Since the application was not in writing and attached to the policy, the insurer could not defend upon the ground of material misrepresentations not amounting to actual fraud. The failure to make the application a part of the contract differentiates the case from such cases as *Supreme Conclave Knights v. Wood*, 120 Ga. 328, 47 S. E. 940, where it was held that a material misrepresentation will avoid the policy, whether the statement was made in good faith or wilfully or fraudulently."

Knowledge of Agent as Waiver.—In *Interstate Life, etc., Co. v. Bess*, 35 Ga. App. 723, 726, 134 S. E. 804, it was said by Bell, J., "In a case like the present, if the agent had actual knowledge of the facts which by a stipulation in the contract would render it void, the insurer could not set up such facts as a defense. But before the knowledge of the agent could work a waiver on the part of his principal, the knowledge must have been actual. Constructive knowledge would not be sufficient for that purpose."

Section Given in Charge.—It would seem that it would not be harmful to the insurer to give in charge a part or all of the above Code section where the sole defense is actual fraud. *Interstate Life, etc., Co. v. Bess*, 35 Ga. App. 723, 134 S. E. 804.

§ 2482. (§ 2100.) Increasing risk.

Provisions of Section Impliedly Written into Policy.—It would seem that the provisions of this section should be considered as impliedly written into the policy, and that if they are violated the company will not be liable. It therefore becomes necessary to determine from all the surrounding facts and circumstances what character of use is contemplated by a policy. *Macon County Ass'n v. Slappey*, 35 Ga. App. 737, 741, 134 S. E. 834.

§ 2489. (§ 2107.) Second insurance.

Applied in *Hall v. Continental Ins. Co.*, 38 Ga. App. 814, 145 S. E. 891.

§ 2490 (§ 2108.) Prescribing regulations.

Section cited in *Alliance Ins. Co. v. Williamson*, 36 Ga. App. 497, 137 S. E. 277.

SECTION 12

Life Insurance

§ 2498. (§ 2116.) To whom to be paid.

Applied in *American National Ins. Co. v. Brantley*, 38 Ga. App. 505, 144 S. E. 332.

§ 2499. (§ 2117.) Law of fire-insurance applicable.

Cited in *McGlathlin v. United States Nat. Life, etc., Co.*, 35 Ga. App. 325, 136 S. E. 535; *Pacific, etc., Ins. Co. v. Manley (Ga.)*, 27 Fed. (2d) 915.

§ 2499(a). Park's Code.

See § 2501(1).

§ 2501(1). Medical examinations.—All persons applying for life-insurance in a life-insurance company writing life insurance in this State shall submit to such reasonable rules and regulations as may be prescribed by such insurance companies; and after a policy is issued on the life of such person, the beneficiary of such policy shall be entitled to collect the amount of such policy under the terms of the contract when it matures, unless the applicant or beneficiary has been guilty of actual fraud or has made material misrepresentations in procuring such policy, which representations change the character and nature of the risk as contemplated in the policy so issued by the company. All statements, covenants, and representations contained in applications for insurance shall never be held or construed to be warranties, but shall be held to be representations only. Acts 1912, pp. 119, 130, 1927, p. 223.

Editor's Note.—Prior to its amendment by Acts 1927, this section at its beginning had contained a provision requiring all insurance companies, with certain exceptions, to make a strict medical examination of persons applying for insurance. The provision and the phrase "for the purpose of making such examinations" which appeared after the phrase "such insurance companies," were stricken by the amendment.

SECTION 13

Industrial Life, etc., Insurance

§ 2507. When laws apply.

License Fees of Agents.—Because of this section, section 993(69), relating to taxation of insurance agents, is not applicable to industrial life insurance agents. *Hoover v. Pate*, 162 Ga. 206, 132 S. E. 763.

SECTION 17

Amount of Recovery and Damages

§ 2545. Valued policy.

Limitation of Recovery Void.—Under this section a limitation of the insurance recoverable to three-fourths of the loss is void. *Coffin v. London, etc., Ins. Co. (Ga.)*, 27 Fed. (2d), 616, 617.

Contract Made in Another State.—This section does not apply to a fire insurance contract made in another state covering property located in Georgia. *Coffin v. London, etc., Ins. Co. (Ga.)*, 27 Fed. (2d), 616.

§ 2549. (§ 2140.) Insurance companies shall pay damages, when.

In General.—The evidence did not show bad faith on the part of the company in refusing to pay the loss, and the legal questions involved were sufficiently doubtful and important to justify the insurer in litigating the matter. *Continental Life Ins. Co. v. Wells*, 38 Ga. App. 99, 102, 142 S. E. 90.

Recovery of such damages not prevented by failure to recover full amount of claim. *Atlantic Mut. Fire Ins. Co. v. Laney*, 38 Ga. App. 1, 3, 142 S. E. 571.

Under the foregoing rulings, the plaintiff, as the acknowledged assignee under a valid assignment of the policy, was entitled to recover the full value thereof, and demand made by him at the time of filing proof of loss was sufficient to give rise to an action for the penalty provided by section 2549 of the Civil Code upon the refusal of the company to pay the loss within sixty days from the date of such demand. Whatever might have been the purpose and intent of the company in seeking to protect and adjudicate the rights of other parties owning an interest in the proceeds of the policy, it can not be said as a matter of law that the company was not guilty of bad faith, in a legal sense, in refusing to pay the policy within the time prescribed by the statute. *American National Ins. Co. v. Brantley*, 38 Ga. App. 505, 144 S. E. 332.

Demand and Refusal.—See *Globe, etc., Ins. Co. v. Jewell-Loudermilk Co.*, 36 Ga. App. 538, 137 S. E. 286, stating and applying the principle as set out under this catchline in the Georgia Code of 1926.

In a suit upon an insurance policy, where the only allegation as to a demand upon the insurance company for payment of the loss was contained in the allegation as to the filing of the proof of loss, which was filed prior to December 7, 1925, on which date the insurance company acknowledged receipt of proof of loss and denied liability and refused payment of loss, and where the suit was filed on January 12, 1926, the petition did not allege a failure of the insurance company to pay the loss within sixty days after demand. *Continental Life Ins. Co. v. Wilson*, 36 Ga. App. 540, 137 S. E. 403.

Same—When Insufficient to Support Verdict for Damages.—In the instant case such a demand as required by the section in order for the insured to recover damages in addition to the loss not being shown by the evidence, the verdict for damages given by the section was unauthorized. The judgment overruling the defendant's motion for a new trial was affirmed on condition that such damages be written off. *Alliance Ins. Co. v. Williamson*, 36 Ga. App. 497, 137 S. E. 277.

Bad Faith.—The "bad faith" referred to in section 299 may be of a different character from that which under certain conditions will authorize a recovery under this section. *Copeland v. Dunahoo*, 36 Ga. App. 817, 823, 138 S. E. 267.

An Exception to Section 4393.—In *Copeland v. Dunahoo*, 36 Ga. App. 817, 821, 138 S. E. 267, Bell, J., intimates that this section is an exception to the provision in section 4393, which provides that "exemplary damages can never be allowed in cases arising on contracts."

Contract Made in Another State.—This section does not apply to contract made in another state under the laws of that state covering property located in Georgia where insured resides. *Coffin v. London, etc., Ins. Co.*, (Ga.), 27 Fed. (2d), 616.

SECTION 18

Fidelity Insurance

§ 2559. Proceedings when loss occurs.

Cited in *American Surety Co. v. Kea*, 168 Ga. 228, 147 S. E. 386.

SECTION 19

Suits against Insurance Companies

§ 2563. (§ 2145.) Suits against insurance companies.

Agents in County When Policy Issued. — A petition against an insurance company, wherein it is alleged that at the time of the issuance of the policy sued on the defendant was represented by named agents in the county in which the suit was filed, alleges jurisdiction in that county, as provided in the section. Process issued thereon is valid. *Hagler v. Pacific Fire Ins. Co.*, 36 Ga. App. 530, 137 S. E. 293.

When Service Made upon Former Agent.—The fact that no legal service could be perfected upon the defendant insurance company in the instant case, because at the time of filing the petition there was no agent of the defendant in the county upon whom service could be legally perfected, does not affect the validity of the process, but affects only the validity of the service perfected by serving the former agent in the county, who, at the time of service, was not an agent of the company and upon whom legal service could not be perfected. The process, therefore, being valid, was subject to amendment. This case is distinguishable from that of *Union Marine Fire Ins. Co. v. McDermott*, 31 Ga. App. 676, 121 S. E. 849. *Hagler v. Pacific Fire Ins. Co.*, 36 Ga. App. 530, 137 S. E. 293.

Not Applicable to Suit under Section 2446.—This section does not apply to a suit against insurer doing business under 2446. *Export Insurance Co. v. Womack*, 165 Ga. 815, 816, 142 S. E. 851.

§ 2564. (§ 2146.) Service on non-resident, assessment, etc., insurance companies.

Process under Section 2563 Perfected under This Section.—Service upon the defendant company under process issued in accordance with section 2563 can be perfected, under this section by leaving a copy of the petition with the company's agent in the county, if there be one. *Hagler v. Pacific Fire Ins. Co.*, 36 Ga. App. 530, 137 S. E. 293.

ARTICLE 6

Railroads

SECTION 1

Incorporation and Powers

DIVISION 3

Corporate Powers of Railroads

§ 2585. (§ 2167.) Powers of such roads.

Use of Street.—As a general rule, a railroad company must obtain the written consent of the municipal authorities before it can lay a track on any street of a city in this State. *Tift v. Atlantic, etc., R. Co.*, 161 Ga. 432, 443, 131 S. E. 46.

§ 2585(1). Authority to build, relocate, etc.

Approval of Railroad Commission Required.—The right of condemnation given by this and the following section can not be exercised until the railroad commission of this State shall first approve the taking of the property or right of way designated for the public use or uses desired. *Tift v. Atlantic, etc., R. Co.*, 161 Ga. 432, 440, 131 S. E. 46.

§ 2589. (§ 2171). Change of general direction and route.

Municipal Authority.—The provisions of ordinances were held sufficient to express municipal authority to change the location of track and employ the same in the operation of the railroad, in *L. & N. R. Co. v. Merchants and Farmers Bank*, 166 Ga. 310, 142 S. E. 506.

§ 2599(a). Park's Code.

See § 2585(1).

DIVISION 4

Street Railroads

§ 2611. (§ 2181). Electric railroad companies may sell light and power.

Applied in *Southern Railway Co. v. Jenkins*, 39 Ga. App. 588, 147 S. E. 800.

§ 2612. (§ 2182). May acquire property for the purpose.

Applied in *Southern Railway Co. v. Jenkins*, 39 Ga. App. 588, 147 S. E. 800.

SECTION 2

Georgia Public Service Commission

§ 2618. (§ 2185.) Suspension of commissioner from office.

Cited in *Myers v. United States*, 272 U. S. 52.

§ 2630. (§ 2189). Duty of commissioners.

In General.—Under this section and § 2670(1) et seq., the commission has the power to determine what are just and reasonable rates and charges for transportation of passengers on each of the railroads doing business in this State. *Ga. Pub. Serv. Com. v. A. & W. P. R. Co.*, 164 Ga. 822, 139 S. E. 725.

§ 2631. (§ 2190). To make rates.

Maximum intrastate passenger rates were fixed by the Railroad Commission of Georgia, effective since September 1, 1920, at 3.6 cents per mile on railroads doing business in this State. This rate is prima facie reasonable and just. *Ga. Pub. Serv. Com. v. A. & W. P. R. Co.*, 164 Ga. 822, 139 S. E. 725.

Commutation Passenger Fares.—For case holding that the rates established deprived the carrier of due process of law and the equal protection of the laws, see *Ga. Pub. Serv. Com. v. A. & W. P. R. Co.*, 164 Ga. 822, 139 S. E. 725.

§ 2663. Jurisdiction of the commission.

Regulating Baggage.—This section confers the power upon the Public Service Commission to issue an order requiring a terminal company to receive and check to its destination certain properly identified baggage. *Atlanta Terminal Co. v. Georgia Pub. Service Comm.*, 163 Ga. 897, 137 S. E. 556.

Confined to Particular Companies.—The Georgia Public Service Commission has not jurisdiction under the provisions of this and the following section to regulate and control the business of common carriers other than classes of common carrier corporations specifically mentioned in those sections; and the powers so conferred do not extend to regulation of persons operating motor-buses on the highways of the State. *Estes v. Perry*, 167 Ga. 902, 147 S. E. 370.

§ 2670(a). Park's Code.

See § 2670(1).

§ 2670(1). Name changed to public service commission, authority, rights, etc.

Cited and applied in *Atlanta Terminal Co. v. Georgia Pub. Service Comm.*, 163 Ga. 897, 137 S. E. 556, holding that the commission has power to issue order respecting receiving and checking baggage.

SECTION 3

Operation of Railroads

§ 2674. (§ 2221.) Extent of such crossings.

Railroad Owes No Duty to Maintain Highway.—A rail-

road company is under no duty to maintain a public highway, which traverses its right of way, in a condition safe for travel at a point where the highway is not crossed by the company's tracks or at a point not so close to such crossing as to render the repair of the highway at this point "necessary for a traveler to get off, and on the crossing safely and conveniently." *Hall v. Georgia Southern, etc., R. Co.*, 34 Ga. App. 786, 131 S. E. 187.

§ 2677(b). Park's Code.

See § 2677(2).

§ 2677(2). Blow-post; signal of crossing; lookout and exercise of care.

Failure to Comply with Section as Negligence.—If the failure to comply with the section is not the proximate cause of the injury, for example where no post is erected but the engineer nevertheless blew the whistle in accordance with the legal requirements, the presumption of negligence is conclusively rebutted. *Stanford v. Southern R. Co.*, 36 Ga. App. 319, 136 S. E. 804.

Purpose.—The act of 1918 (this and the following sections) which supersedes §§ 2675-2677 of the Civil Code, relied on by counsel, in so far as it limits the speed of trains, applies only when they are approaching crossings, is designed to protect people from injury to person and property only when using the crossings. *Harrison v. Central of Georgia Railway Co.*, 39 Ga. App. 366, 367, 147 S. E. 177.

§ 2677(16). Elimination of grade crossings.—Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act, when in the judgment of the State Highway Department of Georgia it is practicable and, in the interest of public safety, reasonably necessary, the State Highway Department may authorize and direct the elimination of grade-crossings on the State road system; and that when in the judgment of the board of commissioners of roads and revenues of any county in the State of Georgia, or of any other authority having jurisdiction over and control of the public roads of that county, it is practicable and, in the interest of public safety, reasonably necessary, such board of commissioners of roads and revenues, or such other authority having jurisdiction over and control of the public roads of the county, may authorize and direct the elimination of grade-crossings on the public roads of said county; provided, that any such elimination of a grade crossing shall be in accordance with the provisions of this Act, and that no elimination of a crossing at grade of a public county road (as distinguished from a road which constitutes a part of the State highway system) shall be eliminated under the provisions of this Act, upon direction or order of any such county authority, until and unless the State Highway Department of Georgia shall approve any such order of any such county authority, and shall concur therein. Acts 1927, p. 299.

§ 2677(17). Same—Definitions.—For the purposes of this Act, the following definitions shall apply:

"Grade crossing." A crossing at grade of a public road intersecting a track or tracks of a railroad or railroads.

"Department." The State Highway Department of Georgia as constituted under the laws of this State.

"Boards." The boards of commissioners of

roads and revenues of the several counties of the State, or any other duly constituted authority having jurisdiction over and control of the public roads in the counties, in and for the control of which such board or other authority is constituted under the laws of the State of Georgia.

“Railroads.” All steam-railroads and interurban electric or gasoline railways of more than twenty miles in length, which are operated as common carriers, but shall not include street-railways operated in whole or in part within the corporate limits of a city or town, nor logging railroads not operated as common carriers.

“Overpass.” A bridge and approaches thereto for carrying highway traffic over a railroad.

“Underpass.” A bridge and approaches thereto for carrying a railroad over a highway or other public road which is within the purview of this Act.

This Act may be cited as the “Grade-crossing Elimination Act.”

§ 2677(18). Same—Notice to railroad company; adoption of layout.—Whenever the department, with reference to State roads, or a board, with reference to county public roads, shall direct the elimination of any grade-crossing by means of an underpass, overpass, or by relocation, or shall direct the guarding of a grade-crossing by an automatic signaling device, prompt notice of the order in such regard shall be given to the railroad company or companies involved; and within ten (10) days thereafter the representative of the department or board and of the railroad or railroads involved shall meet, and thereafter, within a reasonable time, adopt a layout mutually satisfactory for the construction of a grade separation structure or automatic signalling device. Any such layout so adopted by or through the representatives of a board and of a railroad shall be submitted to the department for its approval, and no work looking to the elimination of the grade-crossing pursuant to the plans so adopted shall be begun until and unless the department concur therein and approve the same, or unless the railroad or railroads involved may agree that its or their portion of the expense involved in the elimination of such grade-crossing shall not be charged against the maximum sum which any one railroad may be required to expend in any one calendar year under any or all of the provisions of this Act, as hereinafter provided. Failing to agree within a reasonable time, then the department or (as the case may be) a board may order the railroad or railroads involved to proceed with the construction of such grade separation structure as it may be required, and as indicated in the plans and specifications accompanying its order; provided, however, that no order of a board entered in such regard shall be binding until and unless the same be concurred in and approved by the department. It shall be the duty of said railroad or railroads to begin work on any such grade separation structure within sixty (60) days after the receipt of a binding order to that effect, and to complete the structure within a reasonable time; provided, however, that in no event shall the railroad or railroads be required, without its con-

sent, to do the actual physical work in providing approaches by fill to an overhead structure or the excavating beneath the supporting structure of an underpass or the approaches thereto, but the cost of such work shall be considered a part of the cost of the grade elimination, whether actually performed by the railroad or the department or board, and such cost shall be apportioned as hereinafter provided.

§ 2677(19). Same—Agreement to apportion work.—The department or board may, by agreement with any railroad company, apportion the work to be done in the construction of any grade separation structure, between the railroad company or companies and contractors acting under the control and supervision of the department or of the board; provided, that whenever the department or a board, or any of its or their employees or contra [contractors] acting under the orders of the department or board, or of its or their contractors, shall go upon or be upon the right-of-way of the railroad company, they shall be subject to any reasonable rules and regulations of such railroad made for the protection of its traffic, employees, and passengers.

§ 2677(20). Same—Space for additional track.—When either an overpass or an underpass is constructed under the provisions of this Act, the same shall be so designed and constructed as to be sufficient to accommodate at least one railroad-track in addition to those existing at the time of said construction, unless this requirement is waived by the railroad.

§ 2677(21). Same—Division of cost.—The division of the costs of elimination of grade-crossings by means of grade separation structures shall be as follows:

(a) The total cost of surveys and of the preparation of the plans and specifications, and of the estimates of the cost thereof, shall be paid, one half by the department or county board, and one half by the railroad or railroads involved.

(b) The total cost of a grade-crossing elimination by the use of an overpass or underpass, including the establishment of drainage, shall be paid, one half by the department or (as the case may be) the board, and one half by the railroad or railroads involved; provided, that the construction expense in which the railroad or railroads involved may be required to participate shall be confined to the grade-separation structure and the approaches thereto not exceeding three hundred (300) feet on each side from the center line of the track or tracks as measured along the center of the highways. The approaches shall not be regarded as extending farther than from grade point to grade point, and the railroad shall not be charged with any cost of paving, except on the flooring of an overpass.

(c) In no plan providing either for an overpass or underpass shall the department or board interfere with or change the grade or alignment of the tracks of any railroad, or relocate the line of the railroad, without its consent. Nothing herein, however, shall prevent the department or county board and the railroad or railroads in-

volved from mutually agreeing to the change of the grade or alignment of any track or tracks, or the relocation of the same, and in case of such an agreement the expense of making such change shall be borne equally by the department or board and the railroad or railroads involved; provided, that such change in the railroad-tracks has been made at the written request of the department or county board.

§ 2677(22). Same — Automatic signaling device, required when.—Whenever in the judgment of the department the installation of an automatic signaling device may be reasonably required at a grade-crossing of a State road, and whenever in the judgment of a board the installation of an automatic signaling device may be reasonably required at a grade-crossing of a county road, the department or (as the case may be) a board may require, by written order, the railroad or railroads involved to provide such automatic signaling device as may be appropriate. In any such case the expense of acquiring and installing such device shall be divided equally between the department or county board and the railroad or railroads involved, but the railroad or railroads involved shall at its or their own expense maintain the same.

§ 2677(23). Same—Underpass or overpass unsafe or inadequate; improvement.—Whenever in the judgment of the department exercised in respect of a State road, or in the judgment of a county board exercised in respect of a county public road, an existing underpass or overpass, constructed prior to the approval of this Act, is unsafe or inadequate to serve the traffic for which it was constructed, then the department, when State roads be involved, or the board, when county public roads be involved, may proceed to bring about the improvement or betterment of the existing structure. And in any such event the procedure and division of the cost of construction and the cost of the maintenance of such improvement or betterment, shall be as herein set forth in section 2677(18), (19), (20), (21) and (24) of this Act.

§ 2677(24). Same—Maintenance of overpass, etc.—After the construction of an overpass or underpass, it shall be the duty of the department in the case of State roads, and of the county board in the case of county public roads, to maintain at its or their own expense the drainage, surface, and pavement of the highway and bridge, as well as the approaches and guard-rails, if any; except that when an overpass is constructed with a floor of wood, then the railroad or railroads shall maintain such floor. It shall be the duty of the railroad or railroads to maintain at its expense the foundations, piers, abutments, and superstructures of all underpasses and overpasses located within the limits of its right-of-way.

§ 2677(25) Same—Selection of material.—The railroad company or companies involved shall have the right to select the material to be used

in the construction of the grade-separation structure, provided that such material shall not be less durable than creosoted timber of a quality at least equal to that required by the standard specifications of the department for its own bridge work. Neither the department nor any county board shall require any railroad company to construct an underpass of a design, specification, or plan, the strength of which, in the judgment of the railroad company, shall not be sufficient to meet the requirements of its traffic thereover. In no event shall any railroad company be required to participate in the cost of the construction of any overhead bridge upon a basis or proportion in excess of the cost of a bridge that would be suitable to carry ordinary highway traffic according to the standards of the department, which standards are now for a strength sufficient to support a fifteen-ton roller.

§ 2677(26). Same—Judicial review of order, etc., of department or board.—Any judgment, decision, or order of the department, or of any county board, whether entered upon any question involving the practicability, advisability, or necessity of eliminating any crossing at grade or involving the apportionment of cost of construction, or any other question arising under this Act, shall be subject to judicial review. Pending the final determination of any proceeding at law or in equity so instituted, the department or any county board may, without prejudice to either party, and at its own risk, proceed with the work of eliminating the crossing at grade involved in such litigation, subject to final judgment of the court as to all questions involved in such litigation.

§ 2677(27). Same—Special agreements as to relocation, etc.—Nothing in this Act shall be construed to prevent such department or county board from reaching special agreements with railroad companies providing for grade-crossing elimination by means of relocation of either the railroad or highway involved, or by other means and arranging for joint participation in the cost of such elimination on an agreed basis.

§ 2677(28). Same—Use of right of way.—In all cases where grade-separation structures are built hereunder, the railroad shall permit the use, free of cost, of so much of its right-of-way as may be necessary.

§ 2677(29). Same—Cost where different railroads involved.—Where more than one railroad is involved in the separation of crossings at grade, that portion of the cost of construction and maintenance which this Act provides shall be paid by the railroad or railroads shall be apportioned between such railroads by agreement; and in case they can not agree, the same shall be fixed by the department or (as the case may be) by the county board, after a hearing, subject to a judicial review as provided in section 11, 2677(26) of this Act.

§ 2677(30). Same—Crossings closed; status of

crossings in case of relocation.—All existing grade-crossings replaced by grade-separation structures, or avoided by relocation of highways and no longer used by the general public, shall, where possible, be closed, and where continued shall be private crossings and not subject to the provisions of the statutes of Georgia relating to railroad-crossings.

§ 2677(31). Same—Limit of annual expenditure of railroad.—No railroad shall be required to expend in any one calendar year, under any or all of the provisions of this Act, a sum in excess of \$40,000.00; provided that no railroad whose gross earnings from both inter and intra-state business in the State of Georgia, as reported to the Public Service Commission of Georgia for the preceding calendar year, did not exceed \$2,000,000.00 shall be required without its consent to expend in any one calendar year, under the provisions of this Act, a sum in excess of \$3,000.00. In any case where the proportionate part to be paid by a railroad for the elimination of a crossing at grade, when added to amounts theretofore expended and /or for which obligations have been incurred, would exceed the amount which a railroad may be required to expend under the provisions of this section, the department may pay the excess over and above the aggregate of payments legally permissible for requirement of the railroad, and thereafter collect the same with legal interest during succeeding calendar year or years; but nothing herein contained shall be construed as requiring any railroad company to expend in grade-elimination costs and protection in any one calendar year more than the applicable amount as hereinbefore specified.

§§ 2698(b)-2698(bb). Park's Code.

See §§ 2677(16)-2677(31).

SECTION 6

Railroads as Common Carriers, and Herein of Other Carriers

§ 2711. (§ 2263). Definition.

A person undertaking to transport goods as a private carrier and not as a common carrier is bound only to ordinary diligence. The plaintiff in this case, having sued the defendant merely as a private carrier, can not complain that the court instructed the jury that the defendant was charged with the exercise of ordinary care only. Moreover, the evidence authorized the inference that the defendant was only a private carrier, and there is no assignment that the court erred in failing to submit the question of whether he was a common carrier. *Bloomberg-Michael Furniture Co. v. Urquhart*, 38 Ga. App. 304, 143 S. E. 789.

§ 2712. (§ 2264.) Common carrier.

III. DEFENSES.

Generally.—See *Central, etc., R. Co. v. Council Bros.*, 36 Ga. App. 573, 137 S. E. 569, stating in part the rule set out under this catchline in the Georgia Code of 1926.

Act of God—Distinguished from Unavoidable Accident.—An act of God means any act produced by physical causes which are inevitable. In other words, unavoidable accidents are the same as the acts of God. *Central, etc., R.*

Co. v. Council Bros., 36 Ga. App. 573, 137 S. E. 569; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393. These cases seem to conflict with *Harmony Grove Tel. Co. v. Potts*, 24 Ga. App. 178, 180, 100 S. E. 236, where it was said that a distinction exists between an act of God and an unavoidable accident. It appears though that in the *Fish* case, and in the *Central of Ga. Ry. Co.* case, only phenomena were within the contemplation of the courts, while in the *Telephone Co.* case the court was considering not only natural accidents, which were appropriately classed as acts of God, but also "accidents arising from the negligence or act of man," which are classed as unavoidable accidents. It is submitted that unavoidable accidents is a broad and comprehensive classification, including not only "the negligence or act of man," but also "natural accidents." The so called acts of God are as unavoidable as the acts of man.—Ed. Note.

§ 2713. (§ 2265.) Bailee must show no concurring negligence.

Necessary Proof When Accident Result of Vis Major.—The rule applicable, were it alleged that the damage had been brought about by some vis major, such as an earthquake, lightning, or flood, in which the human element does not and could not enter, would seem to be that where it is alleged that the damage was thus occasioned, it is not necessary for the carrier to show that such an occurrence was in a legal sense an act of God, and its defense would be complete upon proof being made that its own negligence did not contribute to the loss thus caused by an occurrence over which it had no control. *Southern R. Co. v. Standard Growers Exch.*, 34 Ga. App. 534, 130 S. E. 373.

§ 2713(1). Proof of injury, prima facie evidence of want of reasonable skill and care, applies to motor busses.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company, shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. The provisions of this bill shall also apply to all persons, firms or corporations operating busses for hire.

This section shall also apply to passengers of railroad companies. Acts 1929, p. 316, § 1.

§ 2714. (§ 2266.) Carrier of passengers.

Applied in *Georgia Railway and Power Company v. Gilbert*, 39 Ga. App. 56, 146 S. E. 33.

§ 2726. (§ 2276.) Effect of notice to limit.

A contract between a shipper and a carrier for the shipment of goods by sea from a port in this State to a port in the State of Florida is in no event to be governed by the provisions of this section. *Bloomberg-Michael Furniture Co. v. Urquhart*, 38 Ga. App. 304, 143 S. E. 789.

§ 2730. (§ 2279.) Time of responsibility.

Ending of Responsibility as Carrier.—See *Central, etc., R. Co. v. Leverette*, 34 Ga. App. 304, 129 S. E. 292, following the principle stated in paragraph two under this catchline in the Georgia Code of 1926.

SECTION 7

Connecting Roads; Receipt and Delivery of Freight, etc.

§ 2770. (§ 2316). Railroads to make prompt settlements for overcharges.

Applied in *Lumberman's Co. v. Seaboard Airline Ry. Co.*, 37 Ga. App. 176, 139 S. E. 116.

§ 2774. Transportation of perishable products.

Cited in *Western & Atlantic Railroad v. Meister*, 37 Ga. App. 570, 572, 140 S. E. 905.

SECTION 8

Injuries by Railroads

§ 2780. (§ 2321.) Damages by running of cars, etc.

I. IN GENERAL.

Constitutionality.—The presumption of negligence raised by this section is unreasonable and arbitrary, and violates the due process clause of the Fourteenth Amendment. *Western & A. R. R. v. Henderson*, 279 U. S. 639, 49 S. Ct. 445.

Presumption of Proximate Cause.—Under the section there arises, upon proof of injury to a person by a servant of a railroad company, not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury. *Western, etc., Railroad v. Dobbs*, 36 Ga. App. 516, 137 S. E. 407. And a charge to the jury which amounts to an instruction to this effect is not error. *Id.*

Section Modifies General Rule as to Liability of Master.—The general rule that the master is liable for the acts of his servants when done within the scope of their employment, whether the act is wilful or otherwise, is modified as to railway cases, by this section. *Furney v. Tower*, 36 Ga. App. 698, 137 S. E. 850.

For What Acts Liable.—Before the presumption of negligence against a railway company under this section can arise it must be shown that the act complained of was perpetrated by the servant in the conduct of the business of his employment, as the section should be construed with section 4413. *Latimore v. Louisville, etc., R. Co.*, 34 Ga. App. 263, 129 S. E. 108. But it is immaterial whether the act done was in the scope of the servant's particular employment. *Furney v. Tower*, 36 Ga. App. 698, 137 S. E. 850.

II. APPLICATION OF RULE.

Injury to Dog.—In *Alabama Great Southern R. Co. v. Buchannon*, 35 Ga. App. 156, 157, 132 S. E. 253, it was said by Luke, J., who delivered the opinion: "A prima facie case was made for plaintiffs by proof that the dog was killed by the defendant's locomotive, and there should have been a recovery unless the company made it appear that its agents exercised all ordinary and reasonable care and diligence. It was the duty of the company, through its delegated agents and employees, to keep a lookout ahead of the train and to use ordinary and reasonable diligence to discover the dog upon the track and to avoid injuring it."

Applies to Street Railways.—This section applies to street-railways. *Greeson v. Bailey*, 167 Ga. 638, 639, 146 S. E. 490; *Thomas v. Bailey*, 167 Ga. 638, 639, 146 S. E. 490, citing *Corday v. Sav., etc., Ry., Co.*, 117 Ga. 464, 43 S. E. 755.

A presumption of negligence proximately causing an injury arises against a railroad company upon proof that the injury was caused by the operation of the defendant's train. It is not necessary, in order to enable the plaintiff to avail himself of this presumption, for him to prove, otherwise than by showing that his injury was caused by the operation of the defendant's train, that the presumed negligence of the defendant proximately caused the injury. *Western & Atlantic Railroad v. Dobbs*, 36 Ga. App. 516, 137 S. E. 407; *Western, etc., Railroad v. Thompson*, 38 Ga. App. 599, 144 S. E. 831.

Applied in Georgia Railway and Power Company v. Gilbert, 39 Ga. App. 56, 146 S. E. 33.

Cited in *Western, etc., Railroad v. Peterson*, 168 Ga. 259, 268, 147 S. E. 513.

III. PRACTICE AND PLEADING.

Charge Improperly Construing Section.—Where the trial judge charged the jury as follows: "I charge you that the burden of proof in this case rests upon the plaintiff, that is the burden of proof is upon the plaintiff to satisfy the minds of the jury by the preponderance of the testimony of all the material allegations set out in the original petition in this case and the amendments that have been made and allowed by the court in the trial of this case," it was held that this excerpt deprived the plaintiff of the benefit of the presumption arising in proper cases under the section and

was erroneous. *Central, etc., R. Co. v. Bridwell*, 34 Ga. App. 77, 84, 128 S. E. 238.

§ 2781. (§ 2322.) Consent or negligence.

Effect of Contributory Negligence.—Railroad company held liable to person injured while walking along pathway near train though his negligence was a contributing cause of his injury. *Southern Ry. Co. v. Cochran (Ga.)*, 29 Fed. (2d) 206, 207.

Comparative Negligence Law.—Where a trial judge charged the jury in substance that where both parties were negligent, but the plaintiff could not have avoided injury by the exercise of ordinary care, and the defendant's was greater than that of the plaintiff, that the rule of comparative negligence and consequent diminution of damages was applicable, it was held upon appeal, that this instruction did not contravene the rule laid down in *Americus, etc., R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, nor did it exclude the defense that the plaintiff's injury was brought about by his own failure to exercise ordinary care. *Atlantic Coast Line R. Co. v. Anderson*, 35 Ga. App. 292, 133 S. E. 63.

Duty to Charge on Request.—Where the evidence authorized the inference that the plaintiff was negligent, it was error prejudicial to the defendants not to comply with a written request to charge in effect the rule of this section. *Southern R. Co. v. Bottoms*, 35 Ga. App. 804, 134 S. E. 824.

And a charge that the damage which the plaintiff would be entitled to recover should "be reduced as you may find their negligence to be" is not a full and clear statement of the rule. *Southern R. Co. v. Bottoms*, 35 Ga. App. 804, 134 S. E. 824.

Applied in *Seaboard Air-Line Ry. Co. v. Sarman*, 38 Ga. App. 637, 144 S. E. 810.

§ 2782. Injury by coemployee.

Conclusiveness of Presumption.—The presumption of negligence against the employer, arising under this section, from death of a railroad employee, is not conclusive, and, if rebutted by uncontradicted and unimpeached evidence, the court should direct the verdict for the defendant. *Walker v. Charleston, etc., R. Co.*, 8 Fed. (2d), 725.

In an action for death of a railroad employee, supposedly killed when handle of alleged defective jack under freight car flew violently up and struck him under the chin, the presumption of negligence, arising under this section, was conclusively rebutted, and the verdict for the defendant was properly directed. *Walker v. Charleston, etc., R. Co.*, 8 Fed. (2d), 725.

Compared with Federal Employer's Liability Act.—The Federal employer's liability act does not contain the provision embodied in this section to the effect that no recovery shall be had "if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care." Under the Federal employer's liability act, "where it appears that the negligence of the defendant and that of the plaintiff concurred in producing the injury, the negligence of both parties is to be deemed the proximate cause of the injury." *Atlantic Coast Line R. Co. v. Solomon*, 37 Ga. App. 737, 738, 141 S. E. 917, citing *L. & N. R. Co. v. Paschal*, 145 Ga. 521(1), 89 S. E. 620.

§ 2788. (§ 2324.) Receiver's liability to employees.

Consent of Appointing Court Not Requisite to Suit.—This section and the following section (section 2789) are exceptions to the general rule that before a suit can be maintained against a receiver appointed by the courts of this State it is necessary for the consent of the appointing court to be obtained. *Bugg v. Lang*, 35 Ga. App. 704, 134 S. E. 623. And no consent is necessary by the express terms of the Judicial Code (U. S. Comp. Stat. 1916, section 1048) when the appointment is by a Federal Court. *Id.*

Effect upon Federal Receivers.—The authority extended under the Federal statute for suits in the State courts against Federal receivers is paramount, and is in no wise affected by this section. *Bugg v. Lang*, 35 Ga. App. 704, 134 S. E. 623. See also *Eddy v. Lafayette*, 49 Fed. 807, 1 C. C. A. 441.

Lien Subject to Debt Due United States.—A debt of the railroad to the United States has priority over a lien created by this section. *Piedmont Corp. v. Gainesville, etc., Co. (Ga.)*, 30 Fed. (2d) 525.

SECTION 10

Lien against Railroads

§ 2793. (§ 2329). Liens for wages of railroad employees.

Attaches to Property as Employees Only.—The special lien given by this section attaches to the property of their employers only. *Poss Brothers Lumber Co. v. Haynie*, 37 Ga. App. 60, 139 S. E. 127.

So where an owner of timber engages another, as independent contractor, to remove the timber from the woods and saw it into lumber, for a consideration of so much per thousand feet, according to dimensions and specifications to be furnished from time to time by the owner, and where the owner reserves no control of the business thus to be carried on by the other contracting party, and does not interfere and assume such control, servants employed by the latter for the purpose of executing the contract are not employees of the owner of the timber, and lumber manufactured from such timber is not subject to a lien in favor of such employees. *Poss Brothers Lumber Co. v. Haynie*, 37 Ga. App. 60, 139 S. E. 127.

Priorities.—Liens under this section and §§ 2794-2796 for claims incurred prior to receivership, though having priority over the mortgage and other debts of the railroad company, are subject to a debt due to the United States. *Piedmont Corp. v. Gainesville, etc., Co. (Ga.)*, 30 Fed. (2d) 525.

The general scheme of priorities to apply in the distribution of the proceeds of sale of the railroad company's property is as follows: (1) Court costs, expenses of sale, compensation, and expenses of officers of court, including receivers, attorneys, and special master. (2) Taxes, state, county, and municipality. (3) Receiver's certificates. (4) Other debts of the receivership authorized by the court, not including unauthorized loans of cash, but including tort liabilities. (5) The debt due the United States. (6) Unbarred liens under the state laws for wages, supplies, and damages due by the corporation before receivership. (7) The bond mortgage. (8) Other debts due by the corporation, including any unauthorized loans to the receiver, which can be shown to have been used for the benefit of the corporation. *Piedmont Corp. v. Gainesville, etc., R. Co. (Ga.)*, 30 Fed. (2d) 525, 530.

SECTION 11

Suits Against Railroads and Electric Companies.

§ 2798. (§ 2334.) Must be sued where action originates; definition of "electric companies."

See notes to § 2259.

Venue of Continuous Tort to Passenger.—This law is applicable in a case where a passenger brings suit in tort against a railroad company for negligence in carrying her beyond her destination in a particular county and through that county into another state, where further damages result from the continued wrong; and where the railroad company has an agent in the county where the tort originated, the venue of a suit for such injury is exclusively in that county. *Southern R. Co. v. Clark*, 162 Ga. 616, 134 S. E. 605.

ARTICLE 7

Telegraph and Telephone Companies

SECTION 4

Suits against Telegraph Companies

§ 2814. (§ 2348). Telegraph companies, where suable.

See notes to § 2259.

ARTICLE 8

Trust Companies

SECTION 2

Their Powers

§ 2817. Corporate powers.

Power to Contract.—The power to make contracts given by this section cannot be held to authorize all sorts of contracts, because many special sorts are named afterwards, some with limitations and conditions. It is no more than the general power to contract for the proper corporate purposes elsewhere set forth, and does not give a trust company authority to guarantee the paper of banks for which it acts as financial agent. *In re Bankers' Trust Co. (Ga.)*, 27 Fed. (2d) 912, 913.

Cited in *Mobley v. Minter*, 38 Ga. App. 798, 812, 145 S. E. 894.

SECTION 5

Act of 1927

§§ 2820(a)-2820(j). Park's Code.

See §§ 2821(15)-2821(25).

§ 2821(15). Definitions. — The term "trust company" shall be construed to mean a corporation having power to execute trusts, and to act in any fiduciary capacity, whether such corporation has been heretofore organized under the previous acts of the General Assembly of this State or as hereafter organized under this act or any amendment thereto. The term "person" as used in this act shall be construed to mean an individual, a partnership, or an incorporated association. The word "superintendent," as used in this Act refers to and shall mean the Superintendent of banks. Acts 1927, p. 344.

§ 2821(16). Unauthorized use of the word trust company.—No corporation or person, except a corporation duly authorized to do a trust business in this State, shall as a designation or name or part of a designation or name, under which business is or may be conducted make use of the word "trust" in any corporate, artificial, or business name or title, or make use of any office sign at the place where such business is transacted having thereon any word or words indicating that such is the place or office of a trust company. And the use or circulation of any letterheads, billheads, blank forms, notes, receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever having thereon any word or words indicating that such business is the business of a trust company, is prohibited to any corporation or person except those duly authorized under the laws of this State to do a trust business. Except as herein otherwise indicated, the provisions of this Act shall apply to all trust companies heretofore incorporated or doing business at the date of the approval of this Act as well as those hereafter incorporated or established. Provided, however, that any corporation regularly chartered and or-

ganized and engaged in business on the date of the approval of this Act may continue to use its corporate name, but where the words "trust" or "trust company" are a part of such corporate name, the corporation shall on all signs, advertisements, letterheads, billheads, and other printed forms, use in connection with its corporate name the words, "Not under State Supervision."

§ 2821(17). Duties and powers of the superintendent of banks.—Except as may hereafter be prescribed by law, the Superintendent of Banks, in addition to the duties and powers prescribed in this Act, shall have, possess, and exercise all that jurisdiction, control, supervision, and authority over trust companies organized or doing business under this Act, which he now has or may hereafter be given by the laws of this State over State banks. He shall require reports and make examinations of said trust companies in like manner as is now required of State banks. Trust companies for this examination, supervision, and control shall pay to the Superintendent of Banks the same fees that State banks are now or may hereafter be required to pay. The funds derived from this source shall be used to defray the expenses of the Department of Banking.

§ 2821(18). Guaranty.—That no trust company shall engage in or guarantee the payment of bonds and notes secured by mortgage or deed to real estate within the State of Georgia, or secured by pledge of any choses in action, unless it shall first set apart an amount of its assets, the same to be fixed by the Superintendent of Banks, but in no event to be less than ten thousand (\$10,000.00) dollars, as a guaranty fund, which said guaranty fund shall be maintained, unimpaired, or invested in bonds of the United States, or of this State, or of any political subdivision of this State, when and as required to do so by the said superintendent, so long as any guaranty is outstanding. The superintendent shall have the right to designate the place where said guaranty fund shall be deposited. This restriction shall be in addition to the restrictions now imposed by law on trust companies doing business in this State.

§ 2821(19). Trust companies receiving deposits.—That no trust company shall be allowed to receive deposits of any character unless and until its charter shall have been amended so as to confer upon it banking powers and privileges; and when such amendments shall have been obtained and the Superintendent of Banks shall have issued his permit for said company to receive deposits and do business as a bank, it shall be subject to all the provisions of the law relating to banks. Provided, that trust companies heretofore incorporated under the laws of Georgia, with power in their original or amended charters to receive deposits, and that are now conducting their business and reporting to the Superintendent of Banks, shall not be required to further amend their charters in order to continue conducting such business, but they shall be subject to all the provisions of banking laws of this State, subjecting them to the inspection and supervision of the Superintendent of Banks, and their dealing in stocks, bonds, and other securi-

ties shall be subject to inspection and approval of the Superintendent of Banks.

§ 2821(20). Dealing in stocks and bonds.—Trust companies operating as investment bankers, and maintaining departments for the purpose [purchase?] and sale of securities, may purchase for resale whole issues or parts of issues of stocks, and debentures of industrial, railroad, and public-service corporations, and other investment securities, and may resell and deal in the same under such regulations as may be prescribed by the Superintendent of Banks.

§ 2821(21). Amendment to charters.—That the method of obtaining an amendment to the charter of trust company, so as to confer upon it banking powers and privileges, and authorize it to receive deposits, shall be the same as that provided for the amendment of the charter of a bank by sections 1 to 7, inclusive, of article 19 of the Banking Act of 1919, except that the amendment must be authorized by the vote of two-thirds of the outstanding capital stock. When the charter shall have been amended, the stockholders shall be liable to depositors to the same extent as are the stockholders of a bank under article 18 of the Banking Act.

§ 2821(22). Surrender of authority to receive deposits, etc.—Any trust company that has heretofore or may hereafter acquire the right to receive deposits, and thereby become subject to the provisions of this Act, shall have the right to surrender to the Secretary of State its authority to receive deposits and to do a banking business, without impairing in any respect its charter rights to conduct a trust company business, and thereupon shall cease to have the right to receive deposits, but may conduct business as a trust company as though it had never had the right to receive deposits or to do a banking business.

§ 2821(23). Time in which amendment obtained.—Trust companies which have not acquired banking powers, but are receiving savings or other deposits, shall be allowed twelve months from the date of the approval of this Act to secure amendments to their respective charters, conferring such powers, or to pay off and settle with their depositors.

§ 2821(24). Penalty.—Any person who as an officer of any corporation or in his individual capacity shall violate the provisions of this Act, or who shall knowingly permit the violation thereof by any corporation with which he is connected, shall be guilty of a misdemeanor.

§ 2821(25). Certain corporations not affected by this Act.—Nothing in this Act shall be construed to affect, embrace, or include, or to bring within the operation of this Act any corporation chartered by the Superior Court, having trust company powers and without banking powers, and which does not receive deposits subject to check, and which invests its funds in loans on real estate.

Approved August 25, 1927.

ARTICLE 9

Corporations Created by Superior Court

SECTION 1

How Incorporated and Dissolved.

§ 2822. (§ 2349). Special terms to grant charters.

Cited in McKenzie v. Guaranteed Bond, etc., Co., 168 Ga. 145, 148, 147 S. E. 102.

§ 2823. (§ 2350.) Superior courts may create what corporations.

Constitutional Provision.—In 1912 the constitution was amended so as to provide that the General Assembly “may confer this authority to grant corporate powers and privileges to private companies to the judges of the superior court in vacation.” It will be noted that at present the superior courts receive their power to create corporations by virtue of the constitution. This power, however, “shall be” exercised in the manner which the legislature “shall prescribe by law.” Free Gift Society v. Edwards, 163 Ga. 857, 864, 137 S. E. 382.

Courts May Not Delegate Power.—There is no provision of our constitution or statute law authorizing the superior court to commit its delegated powers to a corporation which the court creates by virtue of the power given it by the constitution and law, so as to authorize the corporation thus created to itself charter other corporations without regard to the provisions of our law concerning the acts necessary to be done before the court itself can create such corporations. Free Gift Society v. Edwards, 163 Ga. 857, 864, 137 S. E. 382.

Cited in McKenzie v. Guaranteed Bond, etc., Co., 168 Ga. 145, 148, 147 S. E. 102.

§ 2823(a). Park's Code.

See § 2823(1).

§ 2823(a-1). Park's Code.

See § 2192(1).

§ 2823(1). Charters granted in vacation.

Amendment after Publication. — The order of incorporation is not void where an amendment of the petition, changing the period of incorporation from thirty to twenty years, is permitted after publication, on the ground that such an order was not based upon an application that had been published as required by law. Rogers v. Toccoa Elect. Power Co., 163 Ga. 919, 137 S. E. 272.

Act Changed Rule.—Prior to the passage and approval of this act the judge of the superior court was without jurisdiction to grant a charter to a private corporation in vacation in a county other than where the application was pending. An order purporting to grant a charter in vacation and in another county is a mere nullity. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S. E. 517.

SECTION 2

Schools, Churches, Societies, etc.

§ 2824. (§ 2351). Incorporation of schools, churches, etc.

Presumption of Incorporation.—While a suit cannot be maintained against an unincorporated church, such action being a mere nullity, in an action against the church itself, where the petition is silent as to incorporation and the church answers without raising the question, it will be presumed, in the absence of demurrer, that the defendant

church had become incorporated under the provisions of this section. Zeigler v. Perry, 37 Ga. App. 647, 141 S. E. 426.

§ 2830. (§ 2357). Societies incorporated.

Name, Style and Objects of Association.—Where a plaintiff in its petition designates itself as Tremont Temple Baptist Church, and alleges that it is “a duly organized religious society, and that a certificate of said society has been duly filed and recorded in the office of the clerk of the superior court” of the county in which the church is located, this shows a sufficient compliance with the provisions of the section. Hartsfield v. Tremont Temple Baptist Church, 163 Ga. 557, 136 S. E. 550.

SECTION 7B

Fraternal Benefit Societies

§ 2877(44). Incorporation of fraternal benefit societies of other States.—Any fraternal benefit society or association organized and incorporated under the laws of any other state, and licensed to do business in this State, which has assets including liens charged against certificates in excess of the required reserve liability when its outstanding certificates or contracts are valued on the National Fraternal Congress Table of Mortality with an interest assumption of not more than 4%, or upon the optional standard set forth in section 23, Part I, Title V, No. 524, entitled “An Act for the regulation and control of fraternal benefit societies,” etc., approved August 17th, 1914, or upon some higher standard, may become such fraternal benefit society incorporated under the laws of this State under such name or names as it may select, and with a continuation without intermission or cessation of all its powers, rights, and privileges and of all mutual existing corporate rights, obligations, liabilities, powers, contracts, liens, privileges, and duties at the time existing between said corporation and its members. Its officers shall be continued in office for the terms for which they were elected, with the same rights, responsibilities, liabilities, duties, powers, and privileges as at the time enjoyed and imposed upon them, it being the purpose of this Act to extend and continue such society or association as such a corporation of this State, the same as if it had in all respects originally been incorporated under the laws of this State. That in order to become such a corporation of this State, the officers of such society or association such as the board of control, trustees, directors, council, executive council, or by whatever name known, when thereunto duly authorized by its supreme representative or governing body, by whatever name known, shall file with the Secretary of State of this State a certified copy of its articles of incorporation or charter under which it is then operating, together with a petition asking that such society or association be incorporated as such fraternal benefit society under whatever name or names it may select. That upon the filing of the same with the Secretary of State of this State and paying a fee of one hundred (\$100.00) dollars therefor, such society or association shall immediately thereby become incorporated as a fraternal benefit society of this State and the Secretary of State shall is-

sue to it a certificate of incorporation as a fraternal benefit society with the powers and privileges appertaining thereto. That upon filing a copy of said certificate of incorporation with the Insurance Commissioner of this State and paying a fee of twenty-five (\$25.00) dollars therefor, he shall issue to such fraternal benefit society a license to do business in this State. Such society shall, except as provided in this Act, be governed by the general laws of this State in respect to fraternal benefit societies. Provided, however, that in no event shall any charter rights be granted under this Act which conflict with the general laws of Georgia applicable to such societies or organization; and wherever such conflict occurs, if any, that part of such charter shall be considered stricken, and the remainder not so conflicting with such laws shall be and constitute the charter rights granted hereunder. Nor shall this Act in any way exempt such societies or organizations from any taxes, licenses, or fees which may be acquired of them under existing laws of this State applicable to such societies or organization. Acts 1929, p. 241, § 1.

§ 2877(45). Funds which may be used for expenses.—Such benefit society, after setting up the required reserves on the mortality standard aforesaid, may use any portion of its assets in excess of such reserves as and for its expenses in the procuring, maintaining, and conducting its business. Acts 1929, p. 243, § 2.

§ 2877(46). Forms of certificates issuable.—Any fraternal benefit society maintaining reserve as herein provided may issue to its members or to juveniles such forms of certificate upon such plan of insurance, providing for paid-up insurance, extended insurance, cash-surrender value, whole life and endowment, accident or indemnity, and payable to such beneficiary as may be authorized in the laws of such society. Such society shall have a supreme representative governing body, said representatives to have the qualifications which are required by the laws of such society, and subordinate lodges or branches by whatever name known, into which members at their option be admitted in accordance with its laws. Acts 1929, p. 243, § 3.

§ 2877(47). Remedy in forum of society to be sought before suit; proviso.—No court shall have jurisdiction to entertain any suit or suits against any such fraternal benefit society, unless and until such member shall have first exhausted his remedies within the forums of the society. Provided, that any member or beneficiary may sue upon any certificate or contract, seeking to recover any death or disability loss provided under the terms of such contract or by the laws of such society. Acts 1929, p. 244, § 4.

SECTION 11

Bonded Public Warehousemen

§ 2914. Title passes by transfer of receipt.

This provision is not an exclusive form for pledging

warehouse receipts for a debt. *Augusta Bonded Public Warehouse Co. v. Georgia R. Bank*, 166 Ga. 105, 110, 142 S. E. 559.

On the facts of record and the findings of the jury thereon, a bank to which warehouse receipts were pledged as collateral security for notes of the pledgor company did not take the papers with notice of any secret equity of the warehouseman, and acquired sufficient title to support an action against the warehouseman for the value of the goods stored by the pledgor company, after they had been fraudulently withdrawn from the warehouse, without surrender of the receipts, by the vice-president and general manager of that company. The receipts and indorsements thereon were admissible in evidence over the objections offered. *Augusta Bonded Public Warehouse Co. v. Georgia R. Bank*, 166 Ga. 105, 142 S. E. 559.

ARTICLE 10

Co-operative Marketing Associations

SECTION 1

Under Acts of 1920

§§ 2909(k), 2909(o), 2909(p), 2909(s) 2909(x). Park's Code.

See §§ 2928(42), 2928(46), 2928(47), (2928(50), 2928(55) respectively.

§ 2928(a). Park's Code.

See § 2982(1).

§ 2928(1). Organization; capital stock; application; title; dividends; reserve, profits.

Individual Liability of Members.—Individual liability for debts of a corporation can not be imposed upon all its members by a by-law adopted by vote of a majority of the members where no provision for such liability is made by statute or charter. Corporations without capital stock are within this rule. *Mitcham v. Citizens Bank*, 34 Ga. App. 707, 131 S. E. 181.

Where an action is against the corporation and all its members, the petition should be dismissed on demurrer on the ground of misjoinder of parties. *Mitcham v. Citizens Bank*, 34 Ga. App. 707, 131 S. E. 181.

SECTION 2

Under Acts of 1921

§ 2928(p). Park's Code.

See § 2928(16).

§ 2928(16). Powers.—Each association incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, ginning or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section.

The association, however, shall handle and deal in the agricultural products of non-members, equal in value to, but not greater in value than, that handled by its members.

(b) To borrow money and to make advances to members.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights of ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the By-Laws.

(f) To buy, hold and exercise all privileges of ownership over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association or incidental thereto.

(g) To establish, secure, own and develop patents, trade marks and copyrights.

(h) To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights and privilege necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights, powers, and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with express provisions of this Act; and to do any such thing any where. Acts 1921, pp. 139, 140-1, 142; 1929, p. 223.

§ 2928(q). Park's Code.

See § 2928(17).

§ 2928(17). Members to handle products only through association.—Under the terms and conditions prescribed in its By-Laws, an association may admit as members (or issue common stock to) only persons or associations or corporations composed solely of persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises; and any such persons or associations of persons or corporations may be citizens of or organized under the laws of this State or any other state of the United States.

If a member of a non-stock association be other than a natural person, such members may be represented by any individual, associate, officer or member thereof, duly authorized in writing.

One association organized hereunder may become a member or stockholder of any other as-

sociation or associations organized hereunder. Acts 1921, pp. 139, 142; 1925, p. 150; 1929, p. 223.

§ 2928(aa). Park's Code.

See § 2928(27).

§ 2928 (27). Marketing contracts.

Attorney's Fees.—This section, properly construed, authorizes parties contracting in pursuance of the statute to stipulate for the payment of attorney's fees by the member to the association, in the circumstances therein stated. No prior notice of intended suit is requisite to a recovery of such fees in an action for breach of the contract. Civil Code § 4252 is not applicable. *Brown v. Georgia Cotton Growers Ass'n*, 164 Ga. 712, 139 S. E. 417.

CHAPTER 3

Sale of Stocks, Bonds, etc.; "Blue Sky Law"

§ 2928 (42). Law designated.

It will be presumed, in the absence of anything to show the contrary, that this law was complied with. *Suddath v. Blanchard*, 39 Ga. App. 262, 146 S. E. 798.

Contracts Held Voidable.—In this suit to recover on a stock subscription the petition affirmatively disclosed such a state of facts as rendered the subscription voidable under the securities act, and thus subject to general demurrer. On this question the case is controlled by the decision of the Supreme Court in *Felton v. Highlands Hotel Co.*, 165 Ga. 598, 141 S. E. 793; *Cassini v. Highlands Hotel Co.*, 37 Ga. App. 778, 142 S. E. 565.

§ 2928 (46). Definition of terms.

"Issuers."—Persons who procure contracts of subscription to the stock of a proposed corporation not in esse but which may be organized in the future are not issuers of such stock within the intent and meaning of that term as defined in the Georgia securities law. *Felton v. Highlands Hotel Co.*, 165 Ga. 598, 141 S. E. 793.

§ 2928(47). License necessary.

Persons to Whom Applicable—In Action for Commission.—The defendant, being the issuer, was not required to obtain a permit from the securities commission before putting the stock on the market. Even if the agent or solicitor was required to do this before proceeding to sell the stock, there being nothing to show that when entering into the contract sued on the parties anticipated that the plaintiff would not comply with the law, the defendant can not escape liability for commissions merely because the agent, after the making of the contract, may have violated the criminal law in selling the stock without a license. *Floding Inc. v. Gunter*, 36 Ga. App. 450, 136 S. E. 798.

§ 2928(50). Class "B" defined; act not applicable.

Sale of Class "A" No Offense.—*Taylor v. State*, 34 Ga. App. 4, 128 S. E. 228.

§ 2928 (55). Action arising on sales; non-resident applicants; attorney; service of process.

Failure of Corporation to Comply.—Under this section, in whatever character or capacity they may appear, persons as well as firms and corporations who purpose either to issue or sell stock in an existing or proposed corporation must file with the securities commission the statement prescribed by law; and failure to file such statement avoids the subscription, thereby relieving the subscriber and entitling him to the return of any payments made upon the illegal contract. *Felton v. Highlands Hotel Co.*, 165 Ga. 598, 141 S. E. 793.

THIRD TITLE

Of Domestic Relations

CHAPTER 1

Of Husband and Wife

ARTICLE 1

Of Marriage and Divorce

SECTION 1

Marriage, How and by Whom Contracted

§ 2931. (§ 2412.) Who is able to contract.

Previous Marriage.—If a man who had a living wife undivorced entered into a ceremonial marriage with another woman who was not shown to have known of the former marriage, and they cohabited as husband and wife from the time of such marriage and continued to do so after the death of the first wife, they will be considered thereafter as lawfully married. *Hamilton v. Bell*, 161 Ga. 739, 132 S. E. 83.

§ 2935. (§ 2416.) Void marriages.

Ratification.—If the parties cohabited as husband and wife from the time of the ceremonial marriage, and so continued after the husband's disabilities were removed, they will be considered as lawfully married. *Hawkins v. Hawkins*, 166 Ga. 153, 142 S. E. 684.

§ 2938. Notice of application to be posted; consent of parent or guardian.—Immediately upon receiving application for a license the ordinary or his deputy shall post in the ordinary's office a notice giving the names and residents of the parties applying therefor, and the date of application. No license shall be issued earlier than five days following the date of application for such license, within which period of five days objections to the proposed marriage may be entered; provided the foregoing provisions shall not apply to persons who have arrived at the age of twenty-one years; and upon application for license being made, and the applicant therein claims the party to be twenty-one years of age, or over, it shall be the duty of the ordinary to whom application for license is made to satisfy himself that the applicant's contention as to age is true. If said ordinary does not know of his own knowledge that both parties for whom a marriage license is sought are twenty-one years of age, or over, shall require applicants to furnish birth certificates, or, in lieu thereof, affidavits from at least two persons showing the ages of both parties to be twenty-one years of age, or over; and upon the failure of applicant to convince the ordinary in the foregoing way, shall be required to post notice of said application for the period of five days, as is provided in Georgia Laws 1924, page 53; provided that in case of emergency or extraordinary circumstance the judge of the court having probate jurisdiction may authorize the license to be issued at any time before the expiration of said five days. It shall be the

duty of the ordinary and his deputy to inquire as to ages of all persons for whom marriage licenses are asked; and if there be any grounds of suspicion that the female is a minor under the age of eighteen years, such ordinary and his deputy shall refuse to grant the license until the written consent of the parents or guardian, if any, controlling such minor, shall be produced and filed in his office; and any ordinary who, himself or deputy, shall fail to post in his office facts pertaining to the application, or who shall issue a license in violation of the time provision, shall knowingly grant such license without such consent, or without proper precaution in inquiring into the fact of minority, or for the marriage of a female to his knowledge domiciled in another county, shall forfeit the sum of \$500.00 for every such Act, to be recovered at the suit of the clerk of the Superior Court, and added to the educational fund of the county. The posting of said notice may be dispensed with in the case the parents or guardian of the female appears in person before the ordinary and consents in writing to the issuance of said license. Acts 1924, pp. 53, 54; 1927, p. 224.

Editor's Note.—The first proviso and all that follows it down to the second proviso was inserted by the amendment of 1927. The amendment also effected certain minor changes of phraseology not affecting the substance.

§ 2938(a). Park's Code.

See § 2938(1).

§ 2938(1). Application for license; information as to impediments, etc.—Marriage license shall be issued under the rules prescribed by the preceding section on written application made by the person seeking license therefor, verified by oath of applicant, which application shall state that there is no legal impediment to marriage, and shall give the full name of the proposed husband, with date of birth, present address, and name of father and mother, if known, and if unknown shall so state, with present name of proposed wife with date of her birth and present address, with name of father and mother, if known, and if unknown shall so state, and shall be supported by affidavits of two reputable citizens of the United States of America as to truth of recitals in said application, which application shall be filed in the office of ordinary before marriage license shall be issued upon such application, and such application shall remain in the permanent files in the office of the ordinary, and may be used as evidence in any court of law under the rules of evidence made and provided in similar cases. Acts 1927, p. 226.

SECTION 2

Of Divorces, and How Obtained

§ 2944. (§ 2425.) Total and partial, how granted.

Cited in *Gay v. Pantell*, 164 Ga. 738, 139 S. E. 543.

§ 2945. (§ 2426.) Grounds for total divorce.

See annotations to section 2951.

§ 2946. (§ 2427). Discretionary grounds.

Applied in *Smith v. Smith*, 167 Ga. 98, 106, 145 S. E. 63.
Cited in *Baker v. Baker*, 168 Ga. 478, 148 S. E. 151.

§ 2948. (§ 2429). Condonation, collusion, etc.

Applied in Harrell v. Harrell, 165 Ga. 837, 142 S. E. 278.
Cited in Fain v. Fain, 168 Ga. 552, 148 S. E. 395.

§ 2949. (§ 2430.) Confessions of party.

Nonsuit.—Where evidence of a confession is the sole support of a libel for divorce on the ground of adultery, a nonsuit is not erroneous. Langley v. Langley, 165 Ga. 122, 139 S. E. 821.

§ 2951. (§ 2432.) Proceedings.

Right to Expressly Waive Certain Rights.—None of the provisions of this section or sections 2945, 2952 and 2975 affect the general principle which allows a litigant to expressly waive rights accorded him upon which he may either insist or relinquish at his option. Don v. Don, 162 Ga. 240, 243, 133 S. E. 242.

§ 2953. (§ 2434). Libellant can not dismiss, when.

No Dismissal before Verdict.—The libellant can dismiss his or her divorce suit, without the consent of the libelee, at any time before one verdict in favor of the libelee is rendered. This principle is necessarily deducible from this section. Black v. Black, 165 Ga. 243, 140 S. E. 364.

§ 2954. (§ 2435.) Schedule.

Filing in Case of Separation.—Where the parties have separated it is error to order the schedule to be filed as of the date of filing petition for divorce. Smith v. Smith, 162 Ga. 349, 133 S. E. 842.

Applied in Smith v. Smith, 167 Ga. 98, 106, 145 S. E. 63.
Cited in Meadows v. Meadows, 161 Ga. 90, 129 S. E. 659.

§ 2955. (§ 2436.) Transfer pending suit.

Section Not Applicable in Suit for Alimony without Divorce.—In a suit by a wife against her husband for alimony when no suit for divorce is pending, and no schedule of the husband's property is filed, it is not error on the trial, when an ancillary proceeding has been filed subsequently to the filing of the alimony suit, to cancel a deed executed by the husband to his sister, to refuse to give this section in charge. Chandler v. Chandler, 161 Ga. 350, 130 S. E. 685.

Same—Bona Fides a Question for Jury.—In such a suit it was error for the court to charge that a certain deed which purported to convey to a third person, a large portion of the respondent's realty which was alleged in the petition was his property, did not have the effect to pass title to the grantee; it being a question of fact for the jury to decide whether it had been executed bona fide in payment of a pre-existing debt. Mathews v. Mathews, 162 Ga. 233, 133 S. E. 254.

Subordinate to Schedule.—The restriction on alienation imposed by this section of the Civil Code operates only to the extent of rendering the alienation subordinate to any disposition of the scheduled property which may be made by the jury in the final verdict. Stephens v. Stephens, 168 Ga. 630, 148 S. E. 522.

§ 2956. (§ 2437.) Verdict of jury.

When Section Applicable.—This section only refers to cases where a divorce proceeding is pending. Chandler v. Chandler, 161 Ga. 350, 130 S. E. 685.

§ 2964. (§ 2445.) Disabilities, how determined.

In General.—This section provides for a petition and hearing on the question of having plaintiff's disabilities removed. It does not provide for a subsequent hearing.

No attack was made on the validity of this section of the code, and no question was made as to the right of the plaintiff to bring a suit under this section for removal of his disabilities; but it was contended that he did not have the right to bring a second suit under this section of the code after a judgment against him in a former proceeding under the same section. Ison v. Ison, 166 Ga. 225, 142 S. E. 889.

§ 2971. (§ 2452.) Custody of children.

Award to Maternal Grandparents.—Conflicting evidence as to the fitness of either the father or the mother to have custody of the child, the judge does not abuse his discretion in awarding such custody to the maternal grandparents of the child. Phillips v. Phillips, 161 Ga. 79, 129 S. E. 644.

Admissibility of Evidence Tending to Show Immorality of Wife.—The proper disposition of the minor children, issue of the marriage, was involved in the case as made by the pleadings. This being so, evidence tending to show immorality in the wife was admissible over the objection that it was irrelevant and did not support the alleged ground for divorce. Goodin v. Goodin, 166 Ga. 38, 142 S. E. 158.

Section Does Not Apply Unless Divorce Is Granted.—Under this and section 2980 the trial judge can exercise this power only when divorces are granted, or can only make a disposition of the minor children of the marriage during the period the divorce proceeding is pending. Where the case is terminated without a divorce being granted to either of the parties, the court can not exercise this power. This power is one incident to the divorce proceeding, and is exercisable only as above stated. Black v. Black, 165 Ga. 243, 140 S. E. 364, citing Brightwell v. Brightwell, 161 Ga. 8 (2), 125 S. E. 658; Keppel v. Keppel, 92 Ga. 506, 17 S. E. 976.

§ 2972. (§ 2453.) Habeas corpus for wife or child.

Procedure Same as for Habeas Corpus Generally.—No different procedure is provided for obtaining a trial of the writ of habeas corpus under this section of the code from the provisions for the trial of habeas corpus generally, but it is contemplated that the writ shall issue and be tried under this section as provided in the sections relating to habeas corpus generally. Collard v. McCormick, 162 Ga. 116, 120, 132 S. E. 757.

SECTION 3

Of Alimony

§ 2975. (§ 2456.) Permanent and temporary.

When Contention Made That Husband Has no "Estate."—In the instant case the trial judge did not err in awarding temporary alimony and attorney's fees over the contention that the husband had no "estate" out of which the allowance could be made. Lundy v. Lundy, 162 Ga. 42, 132 S. E. 389.

§ 2976. (§ 2457.) Proceedings to obtain.

Cited in Bradley v. Bradley, 168 Ga. 648, 148 S. E. 591.

§ 2979. (§ 2460.) Merits not in issue.

Purpose.—The code as evidenced by this section looks to requiring the husband and father to perform his duty of supporting the wife and children; and it is not necessary to allege, with such strictness as would be required in a libel for divorce, such facts as would authorize the grant of a divorce. Webb v. Webb, 165 Ga. 305, 140 S. E. 872.

§ 2980. (§ 2461.) Support and custody of children pending suits for divorce.

Cited in Hooten v. Hooten, 168 Ga. 86, 147 S. E. 373.

§ 2981. (§ 2462.) Alimony for children on final trial.

Failure to Specify Amount Minor Child Entitled to, etc.—A verdict and decree in a divorce case are not void on the ground that the verdict allowing a stated sum as alimony for the support of the wife and child does not specify what amount the minor child should be entitled to for its support, nor in what manner, how often, nor to whom it should be paid. Cunningham v. Faulkner, 163 Ga. 19, 135 S. E. 403.

When Charge Corrects Previous Error.—When the trial judge, in his charge, instructs the jury to specify "how often, to whom, and until when" the alimony for the child

is to be paid, a previous statement that the father is liable for the support of his minor child until it arrives at the age of 21 years, is not thereby rendered harmless. *Barlow v. Barlow*, 161 Ga. 202, 129 S. E. 860.

§ 2986. (§ 2467.) Proceeding for alimony before the judge.

For Express Use of Minor Child.—Under the circumstances of the instant case the trial judge did not err in entering a judgment awarding attorney's fees and alimony to the wife for the express use of the minor child. *Waller v. Waller*, 163 Ga. 377, 136 S. E. 149.

Petition Held Sufficient.—Under this section the petition in the instant case was sufficient to withstand the general demurrer. *Webb v. Webb*, 165 Ga. 305, 140 S. E. 872.

ARTICLE 2

Of Rights and Liabilities of Husband and Wife

§ 2993. (§ 2474.) Wife's property, when separate.

Transaction in Guise of Quitclaim Deed.—If the wife by a quitclaim deed conveyed land to another, under a scheme by which such person was to sell the same, or so much thereof as might be necessary, and apply the proceeds to the extinguishment of the debts of her husband, such quitclaim deed was null and void, and persons, acquiring title to the land under the grantee in such quitclaim deed, with notice, acquired no title against the wife. It follows that the court erred in rejecting evidence offered by the plaintiff to establish the fact that such quitclaim deed was made by her to the grantee therein for the purpose of paying her husband's debts. *Sikes v. Seckinger*, 164 Ga. 96, 110, 137 S. E. 833.

§ 2996. (§ 2477.) Agency of wife in respect to necessities.

Presumption of Husband's Duty of Support.—Cohabitation raises a presumption of the wife's authority to purchase necessities on the credit of her husband; and where the husband seeks to avoid liability on account of purchases so made, he has the burden of "showing that the goods were supplied under such circumstances that he is not bound to pay for them." *Shaw v. Allen & Co.*, 34 Ga. App. 111, 113, 128 S. E. 699. It is submitted that this is not a case of agency proper, but rather has reference to the husband's legal duty to support his wife. So long as he owes her the duty of support he is bound for her necessities. When this duty ceases to exist, the husband is no longer bound. This is to be distinguished from cases where the husband has held his wife out, by a course of dealing, as his agent. In the instant case the cohabitation merely raises the presumption of the husband's continued duty of support, and places upon him the duty of showing that the wife has forfeited the right to his support. This is the general rule.—Ed. Note.

Same—Agreement with Wife's Mother.—An agreement between the mother and the husband, for the mother to take the wife to her home and bear the expense of her support and maintenance, was held not to relieve the husband from his obligation to support and maintain his wife. *Akin v. Akin*, 163 Ga. 18, 135 S. E. 402.

ARTICLE 3

Of Marriage Contracts and Settlements

§ 3007. (§ 2488.) Wife feme sole as to her separate estate.

See notes to § 4413.

I. IN GENERAL.

Title conveyed by husband as security for debt prevailed against claim of wife in *Hodgson v. Hart*, 165 Ga. 382, 886, 142 S. E. 267.

Cited in *Carter v. Owenby*, 39 Ga. App. 402, 147 S. E. 405.

II. CONTRACTS OF SURETYSHIP.

A. Generally.

Applies to All Contracts—Question of Fraud.—Whether the lender could be defrauded into believing that a married woman could enter into a contract of suretyship, the mere fact that the defendant wife, together with her husband, may have known at the time of the transaction that her promise as a surety was not binding would not operate to change the rule and to render her liable on the contract where otherwise she was not. *Rhodes v. Gunn*, 34 Ga. App. 115, 128 S. E. 213.

Tests as to What Constitutes Suretyship Contract.—A wife can not bind her separate estate by any contract of suretyship nor by any assumption of the debts of her husband, and "No superficial appearance will be permitted to lead the court away from the true inwardness of the transaction." *Rhodes v. Gunn*, 34 Ga. App. 115, 128 S. E. 213, citing *Gross v. Smith*, 31 Ga. App. 95, 119 S. E. 541.

Loan Contract.—Where the real purpose of the loan contract was to borrow money from plaintiff with which to pay the debts of the husband, and the wife signed and executed a contract as surety with notice on the part of the lender, she was entitled to submit this issue to the jury; and the court erred in dismissing the answer setting up such defense. *Braswell v. Federal Land Bank*, 165 Ga. 123, 139 S. E. 861.

B. Conveyance to Secure Husband's or Son's Debts.

In General.—A deed given by a married woman, in pursuance of a scheme by which she pledges her individual property as security for the debt of another, is void in toto. *Lee v. Johnston*, 162 Ga. 560, 134 S. E. 166.

To Secure Partnership Debt.—A note and deed given by a defendant is not binding upon her as a married woman, where it is given as security for a debt of a partnership of which her husband was a member, and it is immaterial whether the debt is assumed as security or paid as her husband's debt at the insistence of the creditor who knew all the circumstances upon which the payment was being made. *Boykin v. Bohler*, 163 Ga. 807, 137 S. E. 45.

III. ASSUMPTION OF HUSBAND'S DEBTS.

A. In General.

Under this section if the wife did not in fact purchase and was not to receive a stock of goods under a contract sued on, but the whole transaction was merely a colorable scheme or device by which the wife was induced by the plaintiff to assume the previous debt of the husband, without any valid consideration flowing to her, she would have the right to repudiate the entire illegal and void transaction, no matter by what device its true inwardness and purpose had been concealed. *Robinson Co. v. Rice*, 39 Ga. App. 785, 786, 148 S. E. 542.

This provision does not prevent a widow, even after she has married again and during her second wedlock, from giving her note, secured by a mortgage on her individual property, as an original undertaking, in extinguishment of a debt contracted by her deceased husband during her marriage with him. *Montgomery v. Padgett*, 33 Ga. App. 389, 144 S. E. 41.

Validity of Indirect Method of Assuming Husband's Debts.—Where, by a scheme or device to which her husband's creditor is a party, a wife is induced to make a gift to her husband of her separate estate for the purpose of being used by the husband in the payment of his debt to the creditor, and the husband conveys the property to the creditor in extinguishment of the debt, such transaction may, at the instance of the wife, be treated as void and as passing no title from the wife. *Calhoun v. Hill*, 35 Ga. App. 18, 131 S. E. 918.

C. Loan to Wife to Pay Debts of Husband.

Lender Husband's Creditor.—See *Jackson v. Jackson*, 161 Ga. 837, 132 S. E. 79, citing and following the paragraph set out under this catchline in the Georgia Code of 1926.

§ 3009. (§ 2490.) Sale to husband or trustees.

Absolutely Void.—A sale and conveyance in violation of this section is not only voidable but void. *Glover v. Summerour*, 165 Ga. 513, 141 S. E. 211, citing *Echols v. Green*, 140 Ga. 678, 79 S. E. 557.

Deed Reciting Consideration Constitutes Sale on Face.—Where a deed from a wife to her husband recites a valuable consideration, such deed upon its face is a contract of sale by the wife to the husband. *Glover v. Summerour*, 165 Ga. 513, 141 S. E. 211, citing *Martin v.*

White, 115 Ga. 866, 42 S. E. 279; Shackelford v. Orris, 135 Ga. 29, 68 S. E. 838; Rich v. Rich, 147 Ga. 488, (3), 94 S. E. 566.

Deed May Constitute Color of Title.—While a deed of bargain and sale of land by a wife to her husband without an order of the superior court is void, nevertheless such deed may constitute color of title. The court did not err in allowing the introduction in evidence of the deed from the wife of defendant's intestate to her husband, to show color of title. Goss v. Brannon, 167 Ga. 498, 146 S. E. 187.

Who May Attack.—A wife's judgment creditor for the price of goods sold to her is not her privy by blood or estate, and as such authorized to attack her deed under this section. Royster Guano Co. v. Odum, 167 Ga. 655, 146 S. E. 475. See McArthur v. Ryles, 162 Ga. 413, 134 S. E. 76, following and applying the paragraph set out under this paragraph in the Georgia Code of 1926.

§ 3010. (§ 2491.) Wife may give to husband.

Applied in Glover v. Summerour, 165 Ga. 513, 141 S. E. 211; Mack v. Pardee, 39 Ga. App. 310, 318, 147 S. E. 147.

§ 3011. (§ 2492.) A married woman may contract; presumptions.

Where Husband Wife's Agent.—Where a husband clothed by a written power of attorney, cancelled a certificate of stock standing in the name of his wife, and had a new certificate issued to himself, even though the legal title passed to the husband, the shares were impressed with a trust, and they were in equity still the property of the wife, as were likewise all income or profits arising or derived from said stock. Bacon v. Bacon, 161 Ga. 978, 133 S. E. 512.

Applied in Davis v. Barrett, 163 Ga. 666, 136 S. E. 904.

CHAPTER 2

Of Parent and Child

ARTICLE 1

Legitimate Children

§ 3016. (§ 2497.) Mode of adopting child.—Any person desirous of adopting a child, so as to render it capable of inheriting his estate, may present a petition to the superior court of the county in which said child may be domiciled, setting forth the name of the father, or, if he be dead or has abandoned his family, the mother, and the consent of such father or mother to the act of adoption; if the child has neither father nor mother, the consent of no person shall be necessary to said adoption. The court, upon being satisfied with the truth of the facts stated in the petition, and of the fact that such father or mother has notice of such application (which notice may be by publication, as required in equity cases for non-resident defendants), or if the father or mother has abandoned the child, and being further satisfied that such adoption would be to the interest of the child, shall declare said child to be the adopted child of such person and capable of inheriting his estate, and also what shall be the name of such child; thenceforward the relation between such person and the adopted child shall be, as to their legal rights and liabilities, the relation of parent and child, except that the adopted father shall never inherit from the child. To all other persons the adopted child shall stand as if no such act of adoption had been taken.

(a) Provided, that no person may adopt a child under this Act unless such person is (1) at least twenty-five years of age, or (2) married and living with husband or wife. The petitioner must be at least ten years older than the child, a resident of this State, and financially able and morally fit to have the care of the child. If the child is 14 years of age or over, his consent shall be necessary to the adoption.

(b) The petition, duly verified in duplicate, shall be filed jointly by husband and wife, unless the person desiring to adopt is unmarried, and shall contain the name and age of the child, the address and age of the petitioner, the name by which the child is to be known, whether the parents are living or not, names and addresses of the living parents or guardians, if known to the petitioner, and a description of any property belonging to said child.

(c) Upon the filing of the petition the court shall issue summons to the next of kin, parents or guardians, brothers and sisters, if living within the State, and legal notice if a non-resident by service if possible, otherwise by publication once a week for four weeks in the official organ of the county where such proceedings are pending. After the expiration of thirty days from the date of filing of the petition, the case shall be placed upon the regular calendar of the court for a hearing before the judge without a jury, and the court shall hear evidence from witnesses as to the good character, moral fitness, and financial ability of the petitioner to care for the child, as well as all other allegations in the petition. When a child has been awarded by court order, or otherwise legally and permanently surrendered, to the custody of a licensed child-placing agency for permanent placing in a foster home, such agency shall be served with summons in lieu of parents and relatives, and the written consent of such agency shall be filed with the court before adoption can be granted.

(d) Upon the first hearing the court may pass an order only granting temporary custody of the child to the petitioner. Final adoption shall be granted only upon a second hearing after the child shall have been in the custody and care of the petitioner for a period of six months.

(e) A copy of the decree of adoption shall be filed with the State Registrar of Vital Statistics. Acts 1855-6, p. 260; 1859, p. 36; 1882-3, p. 59; 1889, p. 69; 1927, p. 142.

Editor's Note.—The clauses (a), (b), (c), (d), and (e) of this section were added by the amendment of 1927.

Presumption That Proceedings Regular.—Every presumption is to be indulged to sustain a proceeding of adoption by a court of competent jurisdiction. Harper v. Lindsey, 162 Ga. 44, 132 S. E. 639.

Estoppel of Parents.—Where adoptive parents seek and obtain the decree they ask for in a court of their selection, and take the child or children so adopted into the family and treat them as their own, they and their heirs and personal representatives are estopped from asserting that the child is not legally adopted. Harper v. Lindsey, 162 Ga. 44, 132 S. E. 639.

§ 3020. (§ 2501.) Parent's obligation.

No Application to Alimony Proceedings.—This section has no application to proceedings for alimony. Barlow v. Barlow, 161 Ga. 202, 129 S. E. 860.

When Mother Must Support Children.—See note under section 554.

§ 3021. (§ 2502.) Parental power, how lost.

In General.—The right to the services of children and the obligation to maintain them go together. Whatever deprives the parent of the right to the custody and services of the child, without fault on his part, relieves him from the duty to support the child. *Thompson v. Georgia Ry. & P. Co.*, 163 Ga. 598, 603, 136 S. E. 895.

Right to Earnings.—Where a minor child labors and earns money, the presumption is that the proceeds of his labor belongs to his father, if living; and where it is claimed that such in fact belongs to the minor, that presumption must be overcome by proof of the fact that the father has, either expressly or impliedly, manumitted the minor so as to allow the proceeds of the labor to go to the minor. *Jones v. McCowen*, 34 Ga. App. 801, 131 S. E. 290.

A father may give to a minor child the right to the products of his labor which products cannot be levied on as property of the father. See *Ehrlich & Co. v. King*, 34 Ga. App. 787, 131 S. E. 524.

Paragraph 5—Effect of Marriage.—The child who marries assumes inconsistent responsibilities which entitle him to the proceeds of his own labor. He becomes the head of a new family, and is no longer a member of the family of his parent. This being so, the parent is under no legal obligation to support him. *Thompson v. Georgia Ry. & P. Co.*, 163 Ga. 598, 604, 136 S. E. 895.

Error, under the facts, in award to father of nine-year boy living with grandparents. See *Dial v. Reid*, 166 Ga. 245, 142 S. E. 881.

Applied in *Proctor v. Proctor*, 164 Ga. 721, 139 S. E. 531.

Cited in *Hooten v. Hooten*, 168 Ga. 86, 147 S. E. 373.

§ 3022(a). Park's Code.

See § 3022(1).

§ 3022. (1). Custody of minor children, no prima facie right in father.

Quoted in *Proctor v. Proctor*, 164 Ga. 721, 139 S. E. 531.

CHAPTER 3

Of Guardian and Ward

ARTICLE 1

Their Appointment, Powers, Duties, Liabilities, Settlements, Resignation, etc.

SECTION 1

How and by Whom Appointed

§ 3032. (§ 2513.) Natural guardian.

Cited in *Fidelity, etc., Co. v. Norwood*, 38 Ga. App. 534, 538, 144 S. E. 387.

§ 3047. (§ 2528.) Bond and oath.

As to suit on guardian's bond in ward's name, see note under section 3054.

§ 3049. (§ 2530.) Additional bond.

Cited in *Fidelity, etc., Co. v. Norwood*, 38 Ga. App. 534, 538, 144 S. E. 387.

§ 3054. (§ 2535.) Suit on guardian's bond.

Suit by Ward in Own Name.—Although the statutory bond required of a guardian under section 3047 is payable

to the ordinary, suit thereon may be maintained by the ward in his own name after becoming of age, and need not be maintained by the ordinary suing for the use of the ward. *Sheppard v. Clark*, 35 Ga. App. 503, 134 S. E. 125.

Guardian Need Not Be Joined.—It is not mandatory, under this section, that the guardian be sued in the same action with the surety. It is merely permissible. *Sheppard v. Clark*, 162 Ga. 143, 132 S. E. 755.

Petition in Action against Guardian and Sureties.—In a suit against the guardian and his surety, it is not necessary to allege that the plaintiff has obtained a judgment against the guardian in his representative capacity, in order to show a cause of action against the surety. *American Surety Co. v. Macon Savings Bank*, 162 Ga. 143, 132 S. E. 636. In this case the history of this section and section 3974, in regard to suits upon administrator's bonds, is reviewed and the two sections are held to be analogous.—Ed. Note.

Petition in Action against Sureties Alone.—In a suit against the sureties upon a guardian's bond by the ward after becoming of age, where the guardian was not made a party defendant, the petition, which recited that a personal judgment had been obtained against the guardian in a suit by the ward and which recited a return of nulla bona upon an execution issued thereon and that the execution had not been paid, set out a cause of action and was not subject to general demurrer, nor to special demurrer upon the ground of non-joinder of parties. *Sheppard v. Clark*, 35 Ga. App. 503, 134 S. E. 125.

Same—Amendment.—In a suit upon a guardian's bond against the sureties on it, the guardian not being joined as a party defendant either in his representative capacity or in his individual capacity, the petition is subject to amendment by alleging judgments rendered against the guardian in his representative capacity and in his individual capacity. *Sheppard v. Clark*, 162 Ga. 143, 132 S. E. 755.

SECTION 2

The Powers, Duties and Liabilities of Guardians.

§ 3063. (§ 2544.) Failing to make returns.

Applied in *Davis v. Culpepper*, 167 Ga. 637, 146 S. E. 319.

§§ 3075(a)-3075(g). Park's Code.

See §§ 4804(1)-4804(7).

ARTICLE 2

Guardians of Lunatics, Idiots, and Persons Non Compos Mentis.

§ 3092. (§ 2573.) Examination of capacity to manage his estate.

Constitutionality.—In *Roberson v. Roberson*, 165 Ga. 447, 141 S. E. 306, it is said: "If the act of August 20, 1918 (Acts 1918, p. 162, amending this section), is unconstitutional for any reason, the petitioner can avail himself of this defense before the ordinary upon the hearing of the application for the appointment of a guardian for him upon the ground of his imbecility; the ordinary, as a branch of the judiciary of this State, having authority, under the above provision of the constitution, to declare said act void if unconstitutional for any of the reasons assigned by petitioner."

Ten Days' Notice.—Under the provisions of this section the ordinary is not authorized to issue a commission de lunatico inquirendo until "ten days' notice of such application has been given to the three nearest adult relatives of such person," unless there is no such relative within this State. *Jackson v. Harris*, 165 Ga. 873, 142 S. E. 273.

Where such an application was issued and served on September 3, the hearing thereon could not lawfully be had until September 14. Excluding either the first or

last day, as required by section 4, paragraph 8, of the Civil Code, ten days did not elapse between September 3 and September 13. Consequently the judgment appointing a guardian for the alleged imbecile on September 13 was void. *Jackson v. Harris*, 165 Ga. 873, 142 S. E. 273.

In view of the foregoing ruling a sale of the property of the alleged imbecile by her alleged guardian was unauthorized, and the court erred in refusing to enjoin such sale. *Jackson v. Harris*, 165 Ga. 873, 142 S. E. 273.

§ 3103. Appointed without trial when in sanatorium; certificate from director of United States Veterans Bureau.—The ordinaries of the several counties of this State are authorized to appoint guardians for idiots, lunatics, and insane persons without a trial, as in section 3092 whenever it shall be made to appear to them that such idiot, lunatic, or insane person is in the lunatic asylum upon commitment thereto, or when it is shown by the certificate of the superintendent of the lunatic asylum in which the party is confined that such person is insane and that it is necessary for such idiot, lunatic, or insane person to have a guardian to take charge of his property. Where a petition is filed for the appointment of a guardian of a mentally incompetent ward, a certificate of the Director of the United States Veterans' Bureau or his authorized representative, setting forth the fact that such person has been rated incompetent by the United States Veterans' Bureau on examination in accordance with the laws and regulations governing such United States Veterans' Bureau, and that the appointment of a guardian is a condition precedent to the payment of any monies due such person by the United States Veterans' Bureau, shall be prima facie evidence of the necessity for such appointment, and the ordinaries of the several counties of this State shall be and they are hereby authorized to appoint guardians without a trial, as in section 3092 of the Civil Code of Georgia of 1910, for any incompetent ward entitled to any benefits which may be payable to such incompetent by the United States Veterans' Bureau or its successor. Acts 1929, p. 250, § 1.

§ 3103(1). Definitions of "Bureau," "estate," "income," "benefits," "Director," "ward," and "guardian."—As used in the amendment of the preceding section and the section following, the term "person" includes a partnership, corporation, or an association; the term "Bureau" means the United States Veterans' Bureau or its successor; the term "estate" and "income" shall include only monies received by the guardian from the Bureau and all earnings, interest, and profits derived therefrom; the term "benefits" shall mean all monies payable by the United States through the Bureau; the term "Director" means the Director of the United States Veterans' Bureau or his successor; the term "ward" means a beneficiary of the Bureau; the term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. Acts 1929, p. 251, § 2.

§ 3103(2). When guardian must be appointed prior to payments of benefits.—Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be

made in the manner hereinafter provided. Acts 1929, p. 251, § 3.

§ 3103(3). Unlawful to act as guardian of more than 5 wards not of the same family.—Except as hereinafter provided, it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. In any case, upon presentation of a petition by an attorney of the Bureau under this section, alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian, and shall discharge such guardian in said case. The limitations of this section shall not apply where the guardian is a bank or trust company acting for the ward's estates only. An individual may be guardian of more than five wards if they are all members of the same family. Acts 1929, p. 251, § 4.

§ 3103(4). Petition for appointment.—A petition for the appointment of a guardian may be filed in the court of ordinary having jurisdiction, by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled, or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person, indicating the necessity for the same, a petition for such appointment may be filed in the court of ordinary having jurisdiction, by or on behalf of any responsible person residing in this State. The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative if known, and the fact that such ward is entitled to receive monies payable by or through the Bureau, and shall set forth the amount of monies then due and the amount of probable future payments. The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward. In the case of a mentally incompetent ward, the petition shall show that such ward has been rated incompetent on examination by the Bureau in accordance with the laws and regulations governing the Bureau. Acts 1929, p. 252, § 5.

§ 3103(5). Petition in case of minor.—Where a petition is filed for the appointment of a guardian of a minor ward, a certificate of the director, or his representative, setting forth the age of such minor as shown by the records of the Bureau, and the fact that the appointment of a guardian is a condition precedent to the payment of any monies due the minor by the Bureau, shall be prima facie evidence of the necessity for such appointment. Acts 1929, p. 252, § 5(a).

§ 3103(6). Notice of petition.—Upon the filing of a petition for the appointment of a guardian under the provisions of this Act, the court shall cause such notice to be given as is provided by law. Acts 1929, p. 253, § (5b).

§ 3103(7). Fitness of appointee; bond of guardian.—Before making an appointment under the provisions of this Act the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a bond to be approved by the court, in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be a surety bond made by a solvent surety company in the form, and be conditioned as required of guardians appointed under general guardianship laws of this State. The court shall have the power from time to time to require the guardian to file an additional bond. Provided, however, that where the total estate coming into the hands of such guardian shall at no time exceed the sum of \$500.00, then a bond with personal sureties, with at least two such sureties thereon, may be accepted if such personal sureties are solvent and are worth respectively the amount named as the penalty of the bond. Acts 1929, p. 253, § 6.

§ 3103(8). Annual accounting.—Every guardian, who shall receive on account of his ward any monies from the Bureau, shall file with the court annually, in the same manner as provided for under the general law of this State for guardians, a full, true and accurate account, on oath, of all monies so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account, and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located. Acts 1929, p. 253, § 7.

§ 3103(9). Removal of guardian not accounting.—If any guardian shall fail to file any account of the monies received by him from the Bureau, or shall fail to furnish the Bureau a copy of his accounts as required by this Act, such failure shall be ground for removal. Acts 1929, p. 254, § 7(a).

§ 3103(10). Compensation of guardian.—Compensation payable to such guardians shall not exceed five per cent. of the income of the ward during any year. In the event of extraordinary services rendered by such guardian, the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau not less than thirty days prior to the hearing on such petition. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. Acts 1929, p. 254, § 8.

§ 3103(11). Investment of funds. — Every

guardian shall invest the funds of the estate in such manner or in such securities, in which the guardian has no interest, as provided by law for general guardians in this State. Acts 1929, p. 254, § 9.

§ 3103(12). Expenditures; authority for. — A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper office of the Bureau in the manner provided in section 8 of this Act. Acts 1929, p. 254, § 10.

§ 3103(13). Commitment to U. S. Veterans' Bureau Hospital.—Whenever it appears that an incompetent or insane veteran of any war, military occupation or expedition is eligible for treatment in a United States Veterans' Bureau Hospital and commitment to such hospital is necessary for the proper care and treatment of such veteran, the courts of ordinary of this State are hereby authorized to communicate with the official in charge of such hospital, with reference to available facilities and eligibility, and upon receipt of a certificate of eligibility from the official in charge of such hospital the court may then direct such veteran's commitment to such United States Veterans' Bureau Hospital. Thereafter such veteran upon admission shall be subject to the rules and regulations of such hospital, and the officials of such hospital shall be vested with the same powers now exercised by the superintendent of the State hospital for mental diseases within this State with reference to the retention of custody of the veteran so committed. Notice of such pending proceedings shall be furnished the person to be committed, and his right to appear and defend shall not be denied. Provided, further, that if a veteran shall choose to defend such action, he shall be tried before a lunacy commission in the court of ordinary having jurisdiction, in the same manner as is provided for other lunatics, idiots, and persons non compos mentis in section 3092 of the Civil Code of 1910. Acts 1929, p. 254, § 11.

§ 3103(14). Defense; petition for discharge of guardian.—When a minor for whom a guardian has been appointed under the provisions of this Act or other laws of this State shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. Acts 1929, p. 255, § 12.

§ 3103(15). Act to be construed liberally. — This Act shall be construed liberally to secure the beneficial intents and purposes thereof, and shall apply only to beneficiaries of the Bureau, who are entitled to any benefits of said Bureau. Acts 1929, p. 255, § 13.

CHAPTER 4

Master and Servant

ARTICLE 2

Master's Liability to Servant

§ 3129. (§ 2610.) Injuries to coemployees.

Definition of Fellow Servants. — In determining whether certain servants are fellow servants it is necessary to decide whether the servants, the nature of their duties being considered, were "about the same business," or were "engaged in the common pursuit,"—a phrase which is occasionally found in the decisions, which means the same thing as being "about the same business." *Holliday v. Merchants, etc., Transp. Co.*, 161 Ga. 949, 953, 132 S. E. 210.

Same—Editor's Note. — See *Holliday v. Merchants & Miners Transp. Co.*, 161 Ga. 949, 132 S. E. 210, following the statement made under this catchline in the Georgia Code of 1926.

§ 3130. (§ 2611.) Duty of master.

III. DUTY TO PROVIDE SAFE MACHINERY AND APPLIANCES.

A. In General.

Stated in *Fulton Bakery v. Williams*, 37 Ga. App. 780, 141 S. E. 922.

Applied in *Southern Railway Co. v. Jenkins*, 39 Ga. App. 588, 147 S. E. 800.

IV. DUTY TO PROVIDE SAFE PLACE TO WORK.

A. In General.

Degree of Care.—It is the master's duty to exercise ordinary and reasonable care to furnish the servant with a safe place to work, under this and the following section. *Whitehurst v. Standard Oil Co.*, 8 Fed. (2d), 728.

C. Application of Rule.

1. In General.

Places to Which Rule Relates. — See *Flippin v. Central etc., Ry. Co.*, 35 Ga. App. 243, 132 S. E. 918, affirming the statement made under this catchline in the Georgia Code of 1926.

VI. DUTY IN REGARD TO INSPECTION AND REPAIR

When a Question for Jury.—In servant's action for injuries from ladder's breaking, whether in exercise of reasonable care in making inspection defendant would not have ascertained that rung of ladder was decayed was for the jury, although the ladder had been recently painted, concealing the defect; it not appearing that examination before the ladder was painted would not have disclosed the defect. *Whitehurst v. Standard Oil Co.*, 8 Fed. (2d), 728.

§ 3131. (§ 2612.) Duty of servant.

II. ASSUMPTION OF RISKS BY SERVANTS.

B. Risks Ordinarily Incidental to Service.

1. In General.

Where a servant has equal means with his master of knowing of the defect or danger which brought about his injury, this is an assumed risk. *Threlkeld v. Anthony*, 36 Ga. App. 227, 136 S. E. 285.

III. ACTIONS FOR INJURIES TO SERVANTS.

A. In General.

Burden of Proof.—The burden is on the plaintiff to show not only negligence on the part of the master, but due care on his own part; and it must appear that the plaintiff did not know, and had not equal means of knowing, all that which is charged as negligence, and that by the exercise of ordinary care he could not have known thereof. *Flippin v. Central, etc., Ry. Co.*, 35 Ga. App. 243, 132 S. E. 918.

Applied in *Newman v. Griffin Foundry, etc., Co.*, 38 Ga. App. 518, 144 S. E. 386.

ARTICLE 4

Child Labor Regulated

§ 3149(h-1). Park's Code.

See § 3149(1).

§ 3149(1). Employment of children under 14 in mills, etc., prohibited.

Provision in Insurance Policy. — A provision in an employer's liability policy of insurance to the effect that the policy shall not apply to injuries sustained by any person employed by the insured "in violation of law as to age, or under the age of fourteen years if there is no legal age limit," contemplates a violation of this section. *Savannah Kaolin Co. v. Travelers Ins. Co.*, 35 Ga. App. 24, 131 S. E. 919.

It does not contemplate merely a criminal violation of the act, which occurs only where the employer knowingly employs a person under the prohibited age. *Savannah Kaolin Co. v. Travelers Ins. Co.*, 35 Ga. App. 24, 131 S. E. 919.

ARTICLE 6

Workmen's Compensation Act.

§ 3154(a). Park's Code.

See § 3154(1).

§ 3154(1). Titles.

Purpose of the Act.—In *Goelitz v. Industrial Board*, 278 Ill. 164, 115 N. E. 855, the Supreme Court of Illinois said: "The fundamental basis of workmen's compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident." *Globe Indemnity Co. v. Lankford*, 35 Ga. App. 599, 603, 134 S. E. 357.

Constitutionality.—The workmen's compensation act is not void because in violation of § 6545, nor as attempting to regulate interstate commerce, "in so far as this particular case is concerned." *Metropolitan Casualty Ins. Co. v. Huhn*, 165 Ga. 667, 142 S. E. 121.

§ 3154(b). Park's Code.

See § 3154(2).

§ 3154(2). Definition of terms; compensation on basis of wage.

Employees of Counties.—So much of the workmen's compensation act as requires the counties of this State to insure their employees against, or pay them compensation for, personal injuries or for their deaths while in the employment of the counties, violates § 6562, of the constitution. *Floyd County v. Scoggings*, 164 Ga. 483, 139 S. E. 11.

Same—Convict.—A convict injured while serving a sentence in a county chain-gang is not an employee of the county and is not entitled to compensation under the Workmen's Compensation Act. *Lawson v. Travelers' Ins. Co.*, 37 Ga. App. 85, 139 S. E. 96.

Baseball Player.—Relation between baseball player and ball-club held that of employee and employer. *Metropolitan Casualty Ins. Co. v. Huhn*, 165 Ga. 667, 142 S. E. 121.

Truck Driver Hired by Employer to Construction Company.—Held employee of company, which was not relieved from liability for compensation for an injury merely because it may neither have paid, nor have been liable to pay, wages directly to the employee. *United States Fidelity & Guaranty Co. v. Stapleton*, 37 Ga. App. 707, 141 S. E. 506, 507.

Officer of Corporation and Person Engaged to Build Residence.—Relation of employer and employee did not exist between officer of corporation and person engaged

to build his residence. *Hartford Accident, etc., Co. v. Thompson*, 167 Ga. 897, 147 S. E. 50.

Relatively to an individual person, the word "employer" as thus used refers to one engaged in business operated for gain or profit, and the word "employee" refers only to persons who are employees "in the usual course of the trade, business, occupation, or profession of the employer or * * incidental thereto." As thus construed the statute does not confer jurisdiction to award compensation for injuries arising out of employment, where, as in this case, the business of the employer is that of an official in a corporation and the employment of the employee is that of constructing a residence for the employer, being a work wholly disconnected from the business of the latter carried on for gain or profit. *Hartford Accident, etc., Co. v. Thompson*, 167 Ga. 897, 900, 147 S. E. 50.

Policeman of County.—The term "employee," in this section does not apply to a county policeman elected or appointed by the county, since it is not the relation of employer and employee which exists between a county and such a county policeman, but such a county policeman is a public officer. *Goss v. Gordon County*, 35 Ga. App. 325, 133 S. E. 68. See also section 3154(8) and annotations thereto.

County Treasurer and Clerk of Board of Roads.—Where the treasurer of a certain county became ex-officio clerk of the board of roads and revenues of that county, he was held to be an officer and not an employee within the meaning of this act. *U. S. Fidelity Guaranty Co. v. Watts*, 35 Ga. App. 447, 133 S. E. 476.

Hernia.—The provisions of sub-section (e) of this section which require that "all hernia, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by radical operation," must be taken as subject to the provisions of sections 3154(26), 3154(27), which limit the liability of the employer for any such treatment to a period of thirty days following the accident, and the sum of \$100. *Southern Surety Co. v. Byck*, 39 Ga. App. 699, 148 S. E. 294, 295.

Independent Contractors and Their Employees.—See notes under § 3154(20).

II. ACCIDENT IN EMPLOYMENT.

See annotations to section 3154(14), as to what constitutes injuries arising "out of the employment."

When Injury Arises in Course of Employment.—An injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of the master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence. *Georgia Railway, etc., Co. v. Clore*, 34 Ga. App. 409, 410, 129 S. E. 799; *Globe Indemnity Co. v. McKendree*, 39 Ga. App. 53, 146 S. E. 46.

Under the workmen's compensation law, an employee is entitled to compensation for injuries from accidents arising out of and in the course of the employment; that is, for such occurrences as might have been reasonably contemplated by the employer as a risk naturally incident to the nature of the employment, or such as, after the event, might be seen to have had its origin in a risk connected with the business of the employment, and to have arisen out of and flowed from that source as a natural consequence. *Keen v. New Amsterdam Casualty Co.*, 34 Ga. App. 257, 129 S. E. 174; *United States Fidelity, etc., Co. v. Green*, 38 Ga. App. 50, 142 S. E. 464, 465; *Maddox v. Travelers' Ins. Co.*, 39 Ga. App. 690, 148 S. E. 307.

An Accident Arises "Out of" the Employment.—See *Maryland Casualty Co. v. Peek*, 36 Ga. App. 557, 559, 127 S. E. 121, citing and following the statement under this catchline in the Georgia Code of 1926.

Necessity of Concurrence.—See *Refining Co. v. Sheffield*, 162 Ga. 656, 134 S. E. 761, and *Montgomery v. Maryland Casualty Co.*, 39 Ga. App. 210, 146 S. E. 504, following the paragraphs set out under this catchline in the Georgia Code of 1926.

Violation of Rule Not Approved by Commission.—An act done in violation of the rule against the use of the elevator by employees is not necessarily one out of the scope of the

employment, to the extent of excluding the master and servant relation; and, where there is nothing to show that the rule had been approved by the industrial commission, its violation would not bar compensation. *American, etc., Ins. Co. v. Hardy*, 36 Ga. App. 487, 491, 137 S. E. 113.

Temporary Suspension of Employment.—Where a member of a crew on a vessel then lying at the docks, a part of the terminals of the defendant, obtained shore-leave and, after two hours spent ashore returned to the terminals and demanded entrance at a gate, even if the relationship of master and servant existing between the member of the crew and the transportation company had been suspended that relationship came immediately into existence again as soon as the servant returned to the gate and demanded admittance. *Holliday v. Merchants, etc., Transp. Co.*, 161 Ga. 949, 132 S. E. 210.

Replacing Belts at Ginnery.—An injury received in replacing the belts at a ginnery, from which they had been borrowed for use in the sawmill of the lumber company, arose "out of and in the course of" the injured person's employment with that company. *Zurich General Accident, etc., Co. v. Ellington*, 34 Ga. App. 490, 130 S. E. 220.

Accidents on Public Highway.—Where the duties of the employee entail his presence or travel upon the highway, the claim for an injury there occurring is not to be barred because it results from a risk common to all others upon the highway under like conditions, unless it is also common to the general public without regard to such conditions, and independently of place, employment, or pursuit. *Globe Indemnity Co. v. MacKendree*, 39 Ga. App. 58, 146 S. E. 46, 47.

Same—Injury from Falling Tree.—Where an employee, while traveling in an automobile upon a public highway in the regular course of his employment, was killed in a section of woodland through which the road passed, by a tree which stood near the road and which was blown upon him and his automobile by a sudden and violent storm, his death arose out of his employment, within the meaning of this section. *Globe Indemnity Co. v. MacKendree*, 39 Ga. App. 58, 146 S. E. 46.

An injury on fishing expedition in navigable waters is compensable. *Maryland Casualty Co. v. Grant*, 39 Ga. App. 668, 146 S. E. 792.

Drowning of watchman while seeking to save his dog held not to have occurred in performance of his duties to his master. *Montgomery v. Maryland Casualty Co.*, 39 Ga. App. 210, 146 S. E. 504.

Injury While Engaged in Horseplay.—Death of employee falling on knife when engaged in "horseplay" with another employee did not "arise out of employment." *Maddox v. Travelers' Ins. Co.*, 39 Ga. App. 690, 148 S. E. 307.

Discharge of Pistol Handled by Meddler.—Accidental discharge of pistol, being handled by fellow servant as mere meddler, causing death held not to arise out of employment. *United States Fidelity, etc., Co. v. Green*, 38 Ga. App. 50, 142 S. E. 464.

Policeman Injured While at Supper.—A policeman may be in the discharge of his duty while wiping the gun furnished him by the city when at home for his supper. *Employers' Liability Assur. Corp. v. Henderson*, 37 Ga. App. 238, 139 S. E. 688.

Sudden Emergency.—An employee does not, in contemplation of law, go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property. *Metropolitan Casualty Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S. E. 37, 39.

Deceased, in catching hold of a live, smoking, and disconnected wire, lying out in the yard, in spite of the repeated warnings of a fellow employee, held not to have acted in any such emergency, so as to bring himself within the scope and operation of such rule. *Metropolitan Casualty Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S. E. 37, 39.

Evidence.—In *Norwick Union Indemnity Co. v. Johnson*, 36 Ga. App. 186, 136 S. E. 335, it was held that the evidence did not authorize the finding that injury arose out of and in the cause of employment. Conversely, in *Accident Corp. v. Martin*, 35 Ga. App. 504, 134 S. E. 174; *Guarantee Corp. v. Wallace*, 35 Ga. App. 571, 134 S. E. 334, and *American, etc., Ins. Co. v. Hardy*, 36 Ga. App. 487, 137 S. E. 113, and *Employers' Liability Assur. Corp. v. Treadwell*, 37 Ga. App. 759, 142 S. E. 182, it was held that the evidence authorized the finding that injury did arise out of and in the cause of the employment.

The obligation of the employer under the act is not that of an absolute insurer, and the burden is upon the claimant to prove that the injury arose in the course of

the employment and also out of it. *Savannah River Lumber Co. v. Bush*, 37 Ga. App. 539, 140 S. E. 899, 900.

Findings of Fact Conclusive.—It is not enough for the commission to state, merely as a conclusion, in the language of the statute, that the injury is found to have arisen out of and in the course of the employment. This does not mean, however, that it is improper for the commission to give its conclusion in the language of the statute, where the findings of fact as stated are sufficient to justify such conclusion. What the court meant in *Southeastern Express Co. v. Edmondson*, 30 Ga. App. 697, 119 S. E. 39, was that a mere statement that the commission finds that the injury arose out of and in the course of the employment is not such a finding of fact as would justify an award, when it stands unsupported by any other findings of fact to justify it as a conclusion. *American, etc., Ins. Co. v. Hardy*, 36 Ga. App. 487, 490, 137 S. E. 113.

III. DISEASE ARISING FROM ACCIDENT.

When Disease Results Naturally and Unavoidably.—See *Casualty Co. v. Smith*, 34 Ga. App. 363, 374, 129 S. E. 880, quoting and following the paragraph set out under this catchline in the Georgia Code of 1926.

Statements after Occurrence of Injury.—The statements of the employee tending to show that he had suffered an injury and that the injury resulted in hernia, having been made some time after the alleged injury, and being merely narrative and descriptive of something which had fully taken place and become a thing of the past, had no probative value in establishing the fact that he was injured. *Bolton v. Columbia Casualty Co.*, 34 Ga. App. 658, 130 S. E. 335.

IV. WILFUL INJURY BY THIRD PERSON.

Assaults for Reasons Not Personal to Employee.—Where one in the discharge of his duties, is required to travel upon a train, his exposure to an unprovoked assault by a passenger, who jumps up from his seat and begins shooting at the passengers, is not a risk incident to the employment, and the death of the employee as a result of such an assault is not an injury which arises out of the employment, and therefore is not compensable. *Maryland Casualty Co. v. Peek*, 36 Ga. App. 557, 137 S. E. 121.

V. COMPENSATION FROM EMPLOYER AND THIRD PERSON—SUBROGATION.

Applied.—For the application of the provision as to subrogation, see *Western Atlantic Railroad v. Henderson*, 35 Ga. App. 363, 133 S. E. 645.

The lien of an attorney under § 3364 is not superseded by the subsequently enacted provision contained in subsection d of this section giving to the person who has paid compensation to the employee under the act a right, by subrogation to the right of the employee, to collect the amount of the compensation paid, out of a fund which the employee has recovered in a tort action against another for damages sustained by the employee as a result of the injury for which the compensation has been paid. Where, however, the fund recovered in the tort action by the employee against the person whose wrongful act inflicted the injury, as damages for the injury for which the employee had already received compensation, is sufficiently large to cover both the amount of the compensation and the amount of the fee for which the attorney has a lien upon the judgment, the person paying the compensation is entitled to collect, out of the judgment in the tort action, the full amount of the compensation paid, without deduction therefrom of any amount to be applied towards the satisfaction of the attorney's lien for fees. *Branch & Howard v. Georgia Casualty Co.*, 39 Ga. App. 319, 147 S. E. 144.

§ 3154(d). Park's Code.

See § 3154(4).

§ 3154(4). Exemption; notices to reject.

As to presumption where there are less number of employees than ten, see note to section 3154(15).

Burden of Proving Rejection of Act.—The burden is upon the employee to prove that the employer rejected the act. This burden is not carried by showing that the employer has not complied with the insurance feature of the act. *McCoy v. Southern Lumber Co.*, 38 Ga. App. 251, 143 S. E. 611, 612.

§§ 3154(g), 3154(h). Park's Code.

See §§ 3154(7), 3154(8).

§ 3154(7). Relief from obligations.

See annotations to section 3154(45).

Employee Not Precluded Notwithstanding Agreement.—An employee can not be deprived of the compensation to which he is entitled thereunder by any agreement between himself and his employer, notwithstanding its approval by the industrial commission. *Globe Indemnity Co. v. Lankford*, 35 Ga. App. 599, 600, 134 S. E. 357.

§ 3154(8). Provisions not applicable to public employees.

Policeman as Employee—Insurance Expressly Covering.—Although a city policeman may not be an "employee" within the meaning of that term as used in this act, yet where an insurance company insures a city under the workmen's compensation act and the policy expressly covers policemen employed by the city and the salaries of the policemen are taken into consideration in fixing the premium, the policemen, in so far as the insurance company is concerned, are employees of the city and entitled to compensation under the policy. *Frankfort General Ins. Co. v. Conduitt*, 74 Ind. App. 584 (127 N. E. 212); *Kennedy v. Kennedy Mfg. Co.*, 177 App. Div. 56 (163 N. Y. Supp. 944); *Maryland Casualty Co. v. Wells*, 35 Ga. App. 759, 134 S. E. 788. See notes to section 3154(2).

Necessity for Election to Come under Act.—Although the plaintiff policeman may not have elected to come under the workmen's compensation act, such election is immaterial to his right to recover compensation as against the insurance carrier, since the insurance carrier, in issuing the policy, regards him as an employee, and it is not necessary for employees of a municipality to elect to come under the act in order to be entitled to compensation. *Employers' Liability Assur. Corp. v. Henderson*, 37 Ga. App. 238, 139 S. E. 688.

§§ 3154(n)-3154(p). Park's Code.

See §§ 3154(14)-3154(16).

§ 3154. (14). Employee's misconduct.

Duty Required by Statute.—Where an employee while traveling in an automobile driven by himself was killed at a public railroad-crossing in a collision between a train and the automobile, compensation should not be denied to his dependents, under the workmen's compensation act, merely because he may have violated the criminal law of this State in not having his vehicle under immediate control on approaching the crossing, and in approaching it at a greater speed than 10 miles per hour. Such conduct on his part would not, without more, constitute wilful misconduct, or a wilful failure or refusal to perform "a duty required by statute," within the meaning of this section. *Carroll v. Aetna Life Ins. Co.*, 39 Ga. App. 78, 146 S. E. 788.

Violation of Traffic Law.—The mere violation by an employee of a criminal statute prescribing rules and regulations in regard to traffic upon a public highway can not amount to wilful misconduct or to a wilful failure or refusal to perform a duty required by statute, so as to bar compensation under the workmen's compensation act. *Standard Acc. Ins. Co. v. Pardue*, 39 Ga. App. 87, 146 S. E. 638.

Applied in *Fulton Bakery v. Williams*, 37 Ga. App. 780, 141 S. E. 922.

§ 3154(15). Common carriers.

Evidence Must Show Requisite Number of Employees.—The judge of the superior court did not err in setting aside the award of the industrial commission, upon the ground that the evidence failed to show that the employer had ten or more employees regularly in service in the same business. *Vandergriff v. Shepard*, 39 Ga. App. 791, 148 S. E. 596.

Presumption of Operating under This Act.—There is no presumption that an employer and an employee are operating under the provisions of the workmen's compensation act where it does not appear that the employer regularly had in service as many as ten employees in the same business within this State. *Bussell v. Dannenberg Co.*, 34 Ga. App. 792, 132 S. E. 230.

Parts of Same Business.—Under the evidence adduced before the industrial commission in this case, the cotton-gin and the planing mill were not parts of the same

business, within the meaning of this section, although they were each operated with power from the same boiler and engine and were owned and controlled by the same persons; and it appearing from the evidence that the decedent was employed only at the gin, and that less than ten employees were regularly employed at that business, and that no election had been made by him and his employers to become bound by the act, the provisions thereof were inapplicable. *Carswell v. Woodward Bros.*, 38 Ga. App. 152, 142 S. E. 907.

§ 3154(16). Action against exempted employer.

Applied in *Fulton Bakery Incorporated v. Williams*, 35 Ga. App. 681, 134 S. E. 621.

§§ 3154(s), 3154(t). Park's Code.

See §§ 3154(19), 3154(20).

§ 3154(19). Settlements encouraged.

This section is not necessarily in conflict with § 10. *Thomas v. Macken*, 37 Ga. App. 624, 141 S. E. 316.

§ 3154(20). Contractor, when liable; recovery.

Employees of Independent Contractor.—See *Zurich General Accident, etc., Ins. Co. v. Lee*, 36 Ga. App. 248, 136 S. E. 173, citing and following the paragraph set out under this catchline in the Georgia Code of 1926. See also, *Irving v. Home Acci. Ins. Co.*, 36 Ga. App. 551, 137 S. E. 105.

Whether Person Employed Independent Contractor or Servant.—Payment by piecework does not necessarily determine the character of the service but the true test in determining whether one is engaged as a servant or occupies the status of an independent contractor ordinarily lies in the answer to the question whether or not the work is to be done according to the workman's own methods, without being subject to the employer's control except as to results to be obtained. *Maryland Casualty Co. v. Radney*, 37 Ga. App. 286, 139 S. E. 832.

Evidence that claimant, engaged in hauling logs to mill of lumber company, furnished own truck and employees, bore own expenses, and was paid per thousand feet, and that company exercised no direction or control over his work, authorized finding that relation of employer and employee did not exist between parties. *Maryland Casualty Co. v. Radney*, 37 Ga. App. 286, 139 S. E. 832.

One employed by owner of timber furnishing sawmill to saw the timber into lumber held an independent contractor. *Irving v. Home Acc. Ins. Co.*, 36 Ga. App. 551, 137 S. E. 105, where the evidence authorizes the inference that the claimant's husband was employed by the alleged employer to operate a sawmill, that for his services he was paid a certain sum per 1,000 feet for all lumber cut, the help being paid by the employer, that the employer retained the right to direct the time and the manner of the execution of the work; the claimant's husband was not an independent contractor, but was a servant of the employer and one for whose death compensation is collectible under the Workmen's Compensation Act. *Employers' Liability Assur. Corp. v. Treadwell*, 37 Ga. App. 759, 142 S. E. 182, 183, citing *Aetna Life Insurance Co. v. Palmer*, 33 Ga. App. 522, 126 S. E. 862; *Davis v. Menefee*, 34 Ga. App. 813, 131 S. E. 527.

Relation at the Time of Injury Governs.—Whatever may have been the previous relation of the deceased employee to the defendant, where the evidence authorizes the finding that at the time of the accident which resulted in his death he was an employee of the defendant, and not the employee of an independent contractor, the authorized finding of the industrial commission upon this issue can not be disturbed. See, in this connection, *Ocean Accident, etc., Corp. v. Council*, 35 Ga. App. 632, 134 S. E. 331; *Ocean Accident & Guarantee Corp. v. Wilson*, 36 Ga. App. 784, 138 S. E. 246.

Institution of Claim against Immediate Employer Prerequisite.—Whatever may be the state of evidence as to the existence of the relation of master and servant between the defendant and the plaintiff, where that part of this section which provides that every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, has not been complied with, no recovery can be had against the principal employer who is not the immediate employer. *Zurich General Accident, etc., Ins. Co. v. Lee*, 36 Ga. App. 248, 136 S. E. 173.

§ 3154(w). Park's Code.

See § 3154(23).

§ 3154(23). Notice of accident or injury by employee.

Notice to Immediate Superior.—The evidence authorized the inference that the representative of the injured employee immediately gave notice of the injury to the immediate superior of the injured employee, and therefore a written notice to the employer was not necessary. *Ocean Accident, etc., Corp. v. Martin*, 35 Ga. App. 504, 134 S. E. 174.

It being undisputed that no notice of the accident was given until after the time prescribed in this section, and there being evidence to support a finding that the failure to give timely notice did not come within any of the exceptions set out in the statute, this court can not disturb the order denying compensation, which was based on the ground that the claim for compensation was barred by failure to give the required notice. *James v. Fite*, 38 Ga. App. 759, 145 S. E. 536.

§ 3154(y). Park's Code.

See § 3154(25).

§ 3154(25). Time of filing claim.

Provides Adequate Remedy at Law.—Under the proviso of this section the employee has an adequate remedy at law, and for this reason he can not apply to a court of equity for relief. *Bishop v. Bussey*, 164 Ga. 642, 139 S. E. 212.

Cited in *Clark v. Maryland Casualty Co.*, 39 Ga. App. 668, 148 S. E. 286.

§ 3154(z). Park's Code.

See § 3154(26).

§ 3154(26). Medical attention; failure to provide.

Cited in *Southern Surety Co. v. Byck*, 39 Ga. App. 699, 148 S. E. 294, 295.

§§ 3154(aa), 3154(bb). Park's Code.

See §§ 3154(27), 3154(28).

§ 3154(27). Liability for medical attention limited.

No Liability over One Hundred Dollars.—Under the provisions of this section the Industrial Commission has no authority to award more than the limit prescribed by this section where the insurance carrier made no agreement that it would be liable for more than the statutory amount. *Lumbermen's Mutual Casualty Co. v. Chandler*, 162 Ga. 244, 133 S. E. 237; *Lumbermen's Mutual Casualty Co. v. Chandler*, 35 Ga. App. 464, 134 S. E. 122.

Cited in *Southern Surety Co. v. Byck*, 39 Ga. App. 699, 148 S. E. 294, 295.

§ 3154(28). Physical examination; refusal to submit to treatment.

It is unnecessary in the instant case to decide whether the refusal by the claimant wife to permit such an autopsy, as proved in this section, would, ipso facto and in all cases, preclude the right to compensation and authorize the dismissal of a claim therefor, and, if not, whether the statute would have such effect in a case where the demand for the autopsy had not been made until about a month after the decedent had been buried, since it appears in this case that the employer, on making such demand under the quoted provision, was enjoined from proceeding with the autopsy, which judgment of the superior court, adjudicating that the employer was not entitled, under the statute, to such autopsy, remains unexcepted to. *Travelers' Insurance Co. v. Lay*, 39 Ga. App. 273, 146 S. E. 641.

§ 3154(ff). Park's Code.

See § 3154(32).

§ 3154(32). Compensation payments.

Permanent Loss of Use of Hand—Total.—Under this section an employee who suffers a permanent and total loss of the use of a hand, by reason of an accident arising out of and in the course of employment, may be allowed compensation at the rate of one-half his weekly wages, for a period of not more than 10 weeks, for total incapacity for work, and is entitled to receive one-half of his weekly wages for an additional period of 150 weeks as compensation for the permanent handicap. *South v. Indemnity Ins. Co.*, 39 Ga. App. 47, 146 S. E. 45, 46.

Same—Partial.—Under this section an employee who suffers a permanent but partial loss of the use of a hand may be allowed compensation at the rate of one-half his weekly wages for a period of not more than 10 weeks, for total incapacity for work, and is entitled to receive, for an additional period of 150 weeks, weekly payments in such proportion of the weekly payment provided by the act for total loss of the use of such member as the partial loss bears to the total loss. *South v. Indemnity Ins. Co.*, 39 Ga. App. 47, 146 S. E. 45, 46.

§ 3154(hh). Park's Code.

See § 3154(34).

§ 3154(34). Injuries not specified in section 3154(32).

Properly construed, the language employed in this section evidences an intention on the part of the General Assembly to subject employers only to liability for accidents, misfortunes, or injuries resulting to their employees during the time of service or employment, and the provisions of this section were evidently embodied in the act with this end in view. *American Mutual Liability Ins. Co. v. Brock*, 165 Ga. 771, 142 S. E. 101.

If the language of this section be so construed as to render an employer liable for an injury accruing to an employee in his employment who has already been previously injured in a prior employment, just as if such employee had never been previously injured, the incorporation of this section in the act would be ineffectual and nugatory. *American Mutual Liability Ins. Co. v. Brock*, 165 Ga. 771, 142 S. E. 101.

Rate of Compensation for Injury to Already Injured Part.—Where an employee who in childhood had lost a foot and a part of one leg to within three inches of the knee, suffered a compensable injury to the remaining portion of his leg, as a result of which he sustained a 50 per cent. loss of the use of that portion, he was entitled to compensation for such partial loss of use at the rate of 50 per cent. of the amount which he should have received for the loss of a leg or for the loss of use of a leg, irrespective of the previous disability or injury. *American Mutual Liability Ins. Co. v. Brock*, 35 Ga. App. 772, 135 S. E. 103.

§ 3154(kk). Park's Code.

See § 3154(37).

§ 3154(37). Accidents outside of State.

Commission Has Jurisdiction.—Though the death of claimant's husband resulted from injuries received in an accident which occurred outside of the State of Georgia, the Industrial Commission of this State was not without jurisdiction to entertain the case growing out of a claim for compensation. *Metropolitan Casualty Ins. Co. v. Huhn*, 165 Ga. 667, 142 S. E. 121.

§ 3154(ll). Park's Code.

See § 3154(38).

§ 3154(38). Death; funeral; dependents.

See notes under § 3154(39).

Cited in *United States Fidelity & Guaranty Co. v. Washington*, 37 Ga. App. 140, 139 S. E. 359, 360.

§ 3154(mm). Park's Code.

See § 3154(39).

§ 3154(39). List of dependents; termination of dependence.

In General.—Dependency, as contemplated in the act, does not arise solely by reason of the employment of the employee and the contribution by him from his wages to the support of the claimant, but may arise otherwise as out of services rendered to the claimant by the employee, who is his child, in work about the home. *Maryland Casualty Co. v. Bartlett*, 37 Ga. App. 777, 142 S. E. 189, 190.

Payable to Dependents Only—Death of Dependent.—The compensation act contemplates that compensation awarded thereunder shall be awarded to dependents only. It follows that where compensation, payable in weekly installments under the terms of the act, has been awarded to a widow on account of the death of her husband as a result of injuries received by him arising out of and in the course of his employment, and the widow dies before all the installments awarded her have become due and payable, the installments becoming due and payable after her death are not payable to her estate. *United States Fidelity & Guaranty Co. v. Hairston*, 37 Ga. App. 234, 139 S. E. 685.

Same—Construction of Award.—Where, after the death of the widow, an administratrix is appointed for her estate and the original award of compensation is by the industrial commission amended by an order which recites the death of the widow as claimant, and which provides that the "compensation due" the claimant "is now due and payable to" the administratrix, this amended order of the industrial commission, in so far as it provides that the compensation shall be payable to the administratrix, will not be construed as making an illegal award to the administratrix of all the remaining installments accruing and becoming due after the death of the claimant. *United States Fidelity & Guaranty Co. v. Hairston*, 37 Ga. App. 234, 139 S. E. 685.

Father Dependent upon Minor Child.—Where it appears that the father, who is the head of the family, is in fact dependent upon his minor child, an award of compensation to the father for the death of the child is not invalid as being for the father and the use of himself and his wife and another minor child. *Maryland Casualty Co. v. Bartlett*, 37 Ga. App. 777, 142 S. E. 189, 190.

Conclusive Presumption as to Dependency of Child under 18—Construction of Stepfather Clause.—Under this section a child under eighteen years of age is conclusively presumed to be wholly dependent on the parent, and is therefore entitled to compensation for the homicide of the parent in accordance with the provisions of the statute. The clause of the act providing that the term "child" as thus used shall include "stepchild" and that the term "parent" shall include "step-parents" is to be liberally construed as enlarging the sphere of conclusive dependency in favor of such a child, so as to include a right which would not otherwise conclusively exist. The provision is not to be construed as intended to exclude by unnecessary implication a plainly established claim for the homicide of an actual parent. *Travelers Ins. Co. v. Williamson*, 35 Ga. App. 214, 132 S. E. 265. See *United States Fidelity & Guaranty Co. v. Washington*, 37 Ga. App. 140, 139 S. E. 359, 360.

A child under eighteen is conclusively presumed to be dependent upon his father. Hence if his mother is divorced and marries another man who becomes his stepfather, this section establishes a principle of double dependency, and the stepfather clause of the section does not preclude him from recovering for the homicide of his actual father. *Travelers Ins. Co. v. Williamson*, 35 Ga. App. 214, 132 S. E. 265.

Evidence.—Evidence held to show a state of partial dependency. *United States Fidelity & Guaranty Co. v. Washington*, 37 Ga. App. 140, 139 S. E. 359, 360.

Where the evidence shows, without dispute, that the employee for whose injury or death compensation is sought had been employed for a period less than three months prior to the accident, the evidence does not affirmatively disprove the fact of dependency for three months, as required under this section as a condition to the allowance of compensation. *Maryland Casualty Co. v. Bartlett*, 37 Ga. App. 777, 142 S. E. 189, 190.

Finding as to Desertion Conclusive When Supported by Any Evidence.—The findings of the industrial commission on questions of fact, which would include any issue upon the question of voluntary desertion by a claimant wife, if supported by any evidence, are conclusive. *United States Casualty Co. v. Matthews*, 35 Ga. App. 526, 133 S. E. 875;

Maryland Casualty Co. v. England, 160 Ga. 810, 812, 129 S. E. 75; Ocean Accident & Guaranty Corp. v. Council, 35 Ga. App. 632, 134 S. E. 331.

Admission of Desertion Amounting to Conclusion of Law.—The finding of the commissioner before whom the case was originally tried, that the claimant was not entitled to compensation on account of her admission "that she had voluntarily left her husband," was a conclusion of law, based upon her own testimony; and hence reversible. Ocean Accident & Guaranty Corp. v. Council, 35 Ga. App. 632, 134 S. E. 331.

Question of Fact.—Except where the workmen's compensation act specifically creates a presumption of dependency in favor of named classes, the question of dependency is one of fact rather than of law. United States Fidelity & Guaranty Co. v. Washington, 37 Ga. App. 140, 139 S. E. 359, 360.

§ 3154(ss). Park's Code.

See § 3154(45).

§ 3154(45). Review of awards.

See annotations to section 3154(58).

Waiver of Right by Contract.—See Globe Indemnity Company v. Lankford, 35 Ga. App. 599, 134 S. E. 357, citing and following the paragraph set out under this catchline in Georgia Code of 1926. See notes of this case under section 3154(50).

Review for Change in Condition.—Under this section upon application to review an award for a change in condition, the essentials leading up to the award are to be taken as *res judicata*, but the physical condition of the employee remains open to inquiry. South v. Indemnity Ins. Co., 39 Ga. App. 47, 146 S. E. 45, 46, citing Globe Indemnity Co. v. Lankford, 35 Ga. App. 599, 134 S. E. 357.

Thus, where the evidence before the industrial commission upon such review authorizes a finding that there has been a change in the condition of the claimant, a new award of compensation, based upon such changed condition, may be entered, although the original award may have been based upon a disability found by the commission, at the time of making such original award, to be permanent. South v. Indemnity Ins. Co., 39 Ga. App. 47, 146 S. E. 45, 46.

However, under this section, no review by the commission of an award of compensation previously made "shall affect such award as regards any monies paid." Accordingly, while the commission may, upon reviewing an award previously made, make a new award "ending, diminishing, or increasing the compensation previously awarded," such an award can not be made retroactive so as to be made effective as of the date of the original award, since to do so would "affect the award previously made as regards" monies paid, but the new award can only become effective as of the time it is entered, and the claimant can not be required to account for monies already paid him under the previous award. South v. Indemnity Ins. Co., 39 Ga. App. 47, 146 S. E. 45, 46.

When the commission found on review that the condition of the claimant had changed, he was subsequently entitled only to compensation as for a permanent partial loss, instead of as for a permanent total loss, of the use of the injured member. But the commission was not authorized to discontinue his compensation entirely, but should have entered a new award allowing him subsequent diminished compensation for the continuing permanent partial loss of the use of such member in the proportion that such partial loss bears to such total loss. South v. Indemnity Ins. Co., 39 Ga. App. 47, 146 S. E. 45, 46.

Same—Wrongful Dismissal by Deputy Commissioner.—Where upon an application by the insurer for an award ending compensation, on the ground of a change in condition, the deputy commissioner, appointed by the commission for the purpose of taking testimony, acted beyond his authority in dismissing the case, it was competent for the commission to treat the application as still pending and to consider the testimony taken by the deputy commissioner, with that subsequently introduced, in determining the final disposition to be made of the application. Robertson v. Aetna Life Ins. Co., 37 Ga. App. 703, 141 S. E. 504, 505.

§ 3154(xx). Park's Code.

See § 3154(50).

§ 3154(50). Industrial Commission created.

Administrative Body—Jurisdiction.—The Industrial Commission is not a court of general jurisdiction, nor even of limited common law jurisdiction, but it is an industrial commission, made so by express terms of the act of the legislature to administer its provisions as provided therein; as such administrative commission it possesses only such jurisdiction, powers, and authority as are conferred upon it by the legislature, or such as arise therefrom by necessary implication to carry out the full and complete exercise of the powers granted. Gravitt v. Ga. Casualty Co., 158 Ga. 613, 123 S. E. 897; Globe Indemnity Co. v. Lankford, 35 Ga. App. 599, 601, 134 S. E. 357.

§ 3154(ccc). Park's Code.

See § 3154(55).

§ 3154(55). Agreements.

Not in Conflict with Section 10.—This section is not necessarily in conflict with section 10 of the Civil Code of 1910, which provides that "a person may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interest." Thomas v. Macken, 37 Ga. App. 624, 141 S. E. 316.

Finality of Award upon the Agreement of Parties.—Where the employer and the claimant reach an agreement in regard to compensation, and a memorandum of the agreement is filed with, and approved by, the industrial commission, and thereupon the commission makes an award to the claimant, and notice of the award is given to the interested parties, the award is final and cannot be set aside, diminished, or increased, unless the parties disagree as to the continuance of any weekly payment under the agreement. Lattimore v. Lumbermen's Mutual Casualty Co., 35 Ga. App. 250, 133 S. E. 291.

§§ 3154(eee)-3154(hhh). Park's Code.

See §§ 3154(57)-3154(60).

§ 3154(57). Conduct of hearings.

Award Directed against Both Employer and Insurer.—The award of the industrial commission should be directed against both the employer and the insurance carrier instead of against the insurance carrier only. Hartford Accident, etc., Co. v. Hall, 36 Ga. App. 574, 576, 137 S. E. 415.

But an award against an insurer should not be set aside at the instance of that party upon the ground that it was not also against the employer. An omission in this regard, if error at all as against the insurer, could amount only to an error of form and not of substance. United States Fidelity & Guaranty Co. v. Newton, 37 Ga. App. 70, 139 S. E. 365, 366.

An award which is directed both to the employer and to the insurance carrier, as well as to the claimant, and orders the insurance carrier, "for the" employer, to pay to the claimant certain sums of money specified, is not an award against the insurance carrier alone, but is an award against both the employer and the insurance carrier. United States Fidelity & Guaranty Co. v. Newton, 37 Ga. App. 70, 139 S. E. 365, 366.

Statement of Findings.—The requirement of this section that an award of the commission be accompanied by a statement of the findings of fact contemplates a concise but comprehensive statement of the cause and circumstances of the accident, as the commission shall find it to have occurred; and it is not enough to state merely in the language of the statute that the injury is or is not found to have arisen out of and in the course of employment. In other words the statement must support the legal conclusions arrived at. Metropolitan Casualty Ins. Co. v. Dallas, 39 Ga. App. 38, 146 S. E. 37, 39.

§ 3154(58). Review.

Discretion of Commission as to Rule 26.—Rule 26 of the industrial commission, laying down the conditions upon which the full commission will hear evidence on review, is to be enforced or relaxed in the discretion of the commission, without interference by the courts. American, etc., Ins. Co. v. Hardy, 36 Ga. App. 487, 137 S. E. 113.

Adequate Remedy Provided.—If the industrial commis-

sion, on the filing of an application by an employer as provided in this section, causes written notice to be served upon the injured employee or his dependents, the person so notified may object to the jurisdiction of the industrial commission on any ground that will show an absence of authority of the commission to inquire into the matter. *Ballenger v. Rock Run Iron Co.*, 166 Ga. 490, 143 S. E. 595.

Where the industrial commission causes notice to be served as indicated above, the employee or his dependents having a remedy at law as stated in the preceding note, by filing with the industrial commission objections to the jurisdiction of that body, a court of equity will not entertain a petition by such injured employee or his dependents, in which the only relief sought is a writ of injunction to prevent the industrial commission from talking and exercising jurisdiction in the matter. *Ballenger v. Rock Run Iron Co.*, 166 Ga. 490, 143 S. E. 595.

Finality of Award.—In *Lumbermen's Mutual Casualty Co. v. Lattimore*, 165 Ga. 501, 141 S. E. 195, it was held, that the award submitted by the commission to the dependent and the insurance carrier was not such a final award as to deprive the commission of jurisdiction to review and revise the award submitted, and enter a final award in the case approving the agreement.

§ 3154(59). Appeals to Superior Court; writ of error.

Exception Must Point out Error.—An exception on appeal from an award of the industrial committee, on the ground of insufficiency of evidence must point out the particular evidence objected to or the ground of objections. *Maryland Casualty Co. v. Wells*, 35 Ga. App. 759, 134 S. E. 788.

Brief of Evidence.—The Code provisions, requiring that, in motions for new trials and in certain other cases, a brief of the evidence shall be made, and shall be approved by the trial judge, do not apply to compensation cases. *United States Fidelity & Guaranty Co. v. Bohannon*, 36 Ga. App. 34, 135 S. E. 319.

Raising New Point on Appeal. — See *Fidelity Co. v. Christian*, 35 Ga. App. 326, 133 S. E. 639, and *Ocean Accident, etc., Corp. v. Martin*, 35 Ga. App. 504, 134 S. E. 174, citing and following the statement made under this catchline in the Georgia Code of 1926.

Findings of Fact Conclusive.—See *Ins. Co. v. Hamilton*, 35 Ga. App. 182, 132 S. E. 240; *Fidelity Co. v. Christian*, 35 Ga. App. 326, 133 S. E. 639; *Maryland Casualty Co. v. Miller*, 36 Ga. App. 631, 137 S. E. 788; *Maryland Casualty Co. v. England*, 160 Ga. 810, 129 S. E. 75; *Robertson v. Aetna Life Ins. Co.*, 37 Ga. App. 703, 141 S. E. 504; *Metropolitan Casualty Ins. Co. v. Dallas*, 39 Ga. App. 38, 146 S. E. 37, 39; *Standard Acc. Ins. Co. v. Pardue*, 39 Ga. App. 87, 146 S. E. 638, 639; *Washington v. United States Fidelity, etc., Co.*, 39 Ga. App. 481, 147 S. E. 533, 534; *Southern Surety Co. v. Byck*, 39 Ga. App. 699, 148 S. E. 294, 295; *United States Fidelity, etc., Co. v. Price*, 38 Ga. App. 346, 144 S. E. 146, 147; *Savannah River Lumber Co. v. Bush*, 37 Ga. App. 539, 140 S. E. 899, 900, following the statement made under this catchline in the Georgia Code of 1926.

But the judgment of the superior court affirming the award of the industrial commission in a case where the evidence fails to show that the death of the deceased arose out of and in the course of his employment, will be reversed upon appeal to the court of appeals. *Georgia Casualty Co. v. Kilburn*, 36 Ga. App. 761, 138 S. E. 257.

Affirmance of Award.—The judgment of the superior court approving the award must be affirmed where the appellate court cannot say that there is no evidence to support the finding of the industrial commission. *Maryland Casualty Co. v. Turk*, 36 Ga. App. 199, 136 S. E. 87.

Affirmance of the award made by Commission, held proper. *Maryland Casualty Co. v. Grant*, 39 Ga. App. 668, 146 S. E. 792; *Standard Acc. Ins. Co. v. Pardue*, 39 Ga. App. 87, 146 S. E. 638; *Metropolitan Casualty Ins. Co. v. Huhn*, 165 Ga. 667, 142 S. E. 121; *Hartford Accident, etc., Co. v. Durden*, 38 Ga. App. 182, 143 S. E. 511, 512; *Lattimore v. Lumbermen's Mut. Casualty Co.*, 37 Ga. App. 688, 141 S. E. 669, 670; *Brown v. United States Fidelity, etc., Co.*, 38 Ga. App. 461, 144 S. E. 343.

Recommittal of Case.—Held proper in *Maryland Casualty Co. v. Bartlett*, 37 Ga. App. 777, 142 S. E. 189, 190; *United States Fidelity & Guaranty Co. v. Washington*, 37 Ga. App. 140, 139 S. E. 359, 360.

A judgment committing the case sufficiently indici-
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ates the question for determination on another hearing before Commission where it recites that "the evidence is insufficient to establish dependency for a period of three months prior to the injury," and that "the evidence is not sufficiently definite and clear as to expense of last illness and funeral bills, and the Commission shall also receive testimony as to these amounts." *Maryland Casualty Co. v. Bartlett*, 37 Ga. App. 777, 142 S. E. 189, 190.

Sufficiency of Evidence Equivalent to Verdict, etc.—See *Fidelity Co. v. Christian*, 35 Ga. App. 326, 133 S. E. 639, following the statement made under this catchline in the Georgia Code of 1926.

Correct Order Not Affected by Erroneous Finding as to Notice.—Where the order of the commission denying compensation is not erroneous upon a given ground and was not affected by an erroneous finding as to lack of notice, it will be sustained irrespective of any error affecting a finding that there was a lack of notice. *Maryland Casualty Co. v. England*, 34 Ga. App. 354, 129 S. E. 446.

Court Authorized to Enter Proper Judgment.—On the appeal of the claimant from an award made on an erroneous basis the superior court is authorized to enter the proper final judgment upon the findings as made. *American, etc., Ins. Co. v. Brock*, 35 Ga. App. 772, 135 S. E. 103.

Power to Re-Open Case.—"The Georgia workmen's compensation act provides for an appeal from the award itself (Park's Code Supp. § 3154(ggg), Michie's Ga. Code, § 3154(59), as rendered by the commission; but the commission has no power or authority to re-open a case for the purpose of amending its award, by making it operative against one of the defendants personally, instead of against the trade-name under which that defendant conducted his business. If it has no jurisdiction for such purpose, then the superior court would also be without jurisdiction for that purpose, on appeal. *Bishop v. Bussey*, 164 Ga. 642, 646, 139 S. E. 212.

§ 3154(60). Judgment in accordance with commission.

In General.—In a case in which the State Industrial Commission has entered an award against an employer, allowing compensation for injuries sustained by an employee (and in which no further proceedings were had upon appeal), and thereafter the employer fails to comply with the terms of the award, such award may be enforced by suit and judgment in the superior court of the employer's residence. *Savannah Lumber Co. v. Burch*, 165 Ga. 706, 142 S. E. 83.

If the insurance carrier becomes insolvent or for any reason the security fails to comply with his obligation, the liability for compensation which has been established by the industrial commission may be enforced by judgment against the employer. *Savannah Lumber Co. v. Burch*, 165 Ga. 706, 142 S. E. 83.

Cited in *United States Fidelity & Guaranty Co. v. Hairston*, 37 Ga. App. 234, 139 S. E. 685.

§ 3154(mmm). Park's Code.

See § 3154(65).

§ 3154(65). Records and reports of injuries and termination of incapacity. — (a) Every employer who accepts the provisions of this Act relative to the payment of compensation shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment, on blanks approved by the commission. Within ten days after the occurrence and knowledge thereof, as provided in section 23, of an injury to an employee requiring medical or surgical treatment, or causing his absence from work for more than seven days, a report thereof shall be made in writing and mailed to the commission on blanks to be procured from the commission for this purpose. (b) The records of the commission, in so far

as they refer to accidents, injuries, and settlements shall not be open to the public; but only to the parties satisfying the commission of their interest in such records and the right to inspect them. (c) Upon the termination of the disability of the injured employee, the employer shall make a supplementary report to the commission on blanks to be procured from the commission for the purpose. (d) The said report shall contain the name, nature, and location of the business of the employer, the name, age, sex, and wages and occupation of the injured employee, and shall state date and hour of the accident causing the injury, the nature and cause of the injury, and such other information as may be required by the commission. (e) Any such employer who refuses or wilfully neglects to make the report required by this section shall be liable for a penalty of not more than twenty-five dollars for each refusal or wilful neglect, to be assessed by a commissioner in an open hearing, with the right of review as in other cases. In the event the employer has transmitted the report to the insurance carrier for the transmission by the insurance carrier to the Industrial Commission, the insurance carrier wilfully neglecting or failing to transmit the report when made to the insurance carrier by the employer shall be liable and shall pay the fine. (f) Every employer shall, upon request of the commission, report the number of its employees, hours of their labor, and number of days of operation of business. Acts 1929, p. 358, § 1.

§ 3154(ttt). Park's Code.

See § 3154(71).

§ 3154(71). Policy or contract of insurance.

Construction of Policy.—Where an insurance policy issued to an employer assuring against liability under the Workmen's Compensation Act provides that it "is written to cover a portable sawmill, an American outfit using a case tractor," and further provides that "it is hereby agreed and understood that this policy covers only the mills specifically described above, and all other work or operations of the assured are excluded from this policy coverage," the words "an American outfit using a case tractor" are words of description and identification, and are not words of limitation or warranty. *Employers' Liability Assur. Corp. v. Treadwell*, 37 Ga. App. 759, 142 S. E. 182, 183.

Same—Liability under Policy.—And where, at the time of the injury received by an employee covered by the policy, the mill had been changed, and there had been substituted therefor another mill with a longer carriage, but where there had been no further change or substitution of any other part of the outfit, but the engine, the tractor, the saw, the belting, and all other equipment, except the mill, had remained the same, the identity of the mill outfit covered by the policy was the same, and there is a liability under the policy for an accident to an employee received from a log falling upon him as he was loading it upon a log cart to be transported to the mill, where the accident arose out of and in the course of his employment. *Employers' Liability Assur. Corp. v. Treadwell*, 37 Ga. App. 759, 142 S. E. 182, 183.

Effect of Insurer's Default.—In *Savannah Lumber Co. v. Burch*, 36 Ga. App. 621, 137 S. E. 786, it was held that the court did not err in overruling the demurrer to a widow's petition against the employer of her deceased husband workman, for the amount of awarded compensation remaining unpaid because of receivership of insurer.

Cited in *United States Fidelity & Guaranty Co. v. Newton*, 37 Ga. App. 70, 139 S. E. 365.

§ 3154(xxx). Park's Code.

See § 3154(75).

§ 3154(75). Prorating of commission expenses; reports; audits.—(a) The rates, charged by all carriers of insurance, including the parties to any reciprocal, or other plan or scheme writing insurance against the liability for compensation under this Act, shall be fair, reasonable, and adequate, with due allowance for merit rating, and all risks of the same kind and degree of hazard shall be written at the same rate by the same carrier. The basic rates for policies or contracts of insurance against liability for compensation under this Act shall be filed with the Insurance Commissioner for his approval, and no policy of insurance against such liability shall be valid until the basic rates thereof have been filed with, approved, and not subsequently disapproved by the Insurance Commissioner. Any plan or scheme for modification of such basic rates by physical inspection or experience or merit rating shall likewise be filed with the Insurance Commissioner and by him approved, and no carrier of insurance shall write any such policy or contract until after filing and approval of a basic rate therefor and a schedule or plan to be employed in producing individual rates for risks. (b) Each such insurance carrier, including the parties to any mutual, reciprocal, or other plan or scheme writing insurance against the liability for compensation under this Act, shall report to the Insurance Commissioner as provided by law, and in accordance with such reasonable rules as the Insurance Commissioner may at any time prescribe for the purpose of determining the solvency of the carrier, and the adequacy or reasonableness of its rates and reserves; for such purpose the Insurance Commissioner may inspect all the books and records of such insurance carrier and its agent or agents, and examine its agents, officers, and directors under oath. (c) Said commissioner shall have the power to, in such manner and by such means as he may deem proper and adequate, gather statistics and information and make investigations concerning rates for such insurance, and to that end he may take into consideration the income and earnings, from any and every source whatever, of any such company and may call upon members of the Industrial Commission to sit with him in an advisory capacity at any investigation or hearing concerning such rates. Authority is hereby conferred upon the Insurance Commissioner to make such arrangements with the Industrial Commission as may be agreeable to the Industrial Commission for collecting, compiling, preserving, and publishing statistical and other data in connection with the work of regulating workmen's compensation insurance rates; and whenever he deems proper, with the consent of the Industrial Commission, he may appoint members of the Industrial Commission, or its employees, as special agents of the Insurance Commissioner to take testimony and make reports with reference to any matter involving questions of workmen's compensation insurance rates. Any party at interest may appeal from any decision of the Insurance Commissioner, made under this section, in the manner provided by law. Acts 1929, p. 360, § 2.

FOURTH TITLE

Of Relations Arising from Other Contracts

CHAPTER 1

Of Partnerships

ARTICLE 1

General Principles

§ 3155. (§ 2626.) How Created.

This Section Not Exhaustive.—As between themselves, “the intent of the parties is the true test of a partnership, which may be created by a contract giving rights or imposing liabilities differing from those from which the law ordinarily infers a partnership.” *Allgood v. Feckoury*, 36 Ga. App. 42, 43, 135 S. E. 314, citing *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759.

§ 3157. (§ 2628). Open partner, etc.

See notes to § 3180.

§ 3158. (§ 2629.) What constitutes a partnership.

In General.—Whenever a joint enterprise, a joint risk, a joint sharing of expenses, and a joint interest in the profits and losses concur, a partnership exists. *Smith v. Hancock*, 163 Ga. 222, 231, 136 S. E. 52.

Joint and Common Interest Distinguished.—A joint interest in partnership property is another and a very distinct thing from a common interest in the profits alone. The former interest is that of an owner, who has a right to dispose of the profits, and that makes him a partner; but a common interest in the profits confers no title jointly with the other and gives no power to control and dispose of the profits as owner. *Smith v. Hancock*, 163 Ga. 222, 231, 136 S. E. 52.

No partnership was created by an agreement that the plaintiff should conduct in the defendant's name a store which was to be owned and supplied with goods by the defendant, and should receive an equal share of the net profits. *Allgood v. Feckoury*, 36 Ga. App. 42, 135 S. E. 314. For a case where the contract between the parties was held to constitute a partnership, see *Smith v. Hancock*, 163 Ga. 222, 136 S. E. 52. See also *Barrow v. Georgia Chemical Works*, 34 Ga. App. 31, 128 S. E. 14; *Nellis & Co. v. Green*, 36 Ga. App. 684, 137 S. E. 843.

§ 3160. (§ 2631). Death of a partner as it affects continuance.

Applied in *Clark v. Tennessee Chemical Co.*, 167 Ga. 248, 145 S. E. 73.

§ 3162. (§ 2633). How it is dissolved.

Applied in *Clark v. Tennessee Chemical Co.*, 167 Ga. 248, 145 S. E. 73.

§ 3164. (§ 2635.) Effect of dissolution.

Notice to Creditor.—The fact that a creditor may have had no sufficient notice of the dissolution of the partnership does not affect the actual right of one of the erstwhile members to contract on behalf of the partnership. *Citizens Nat. Bank v. Jennings*, 35 Ga. App. 553, 555, 134 S. E. 114.

Applied in *Clark v. Tennessee Chemical Co.*, 167 Ga. 248, 145 S. E. 73.

§ 3166. (§ 2637.) Denial by defendant.

Sufficiency of Denial.—A plea of no partnership in which

it was set up that at the time of the execution of a note there was in fact no such partnership, for the reason that the partnership had a short time before been dissolved, is demurrable where it fails to allege that notice of such dissolution had been given as required by law, or that both the original payee and the present holder of the note, at the time of the accrual of their respective rights in it, had actual knowledge of such dissolution. *Cooke v. Faucett*, 35 Ga. App. 209, 132 S. E. 268.

ARTICLE 2

Rights and Liabilities of Partners among Themselves

§ 3172. (§ 2643.) Power of each partner.

Negotiable Paper.—One of the defenses which may be maintained against the suit of a bona fide holder upon a negotiable instrument is a plea of non est factum. But “if a partnership, under any circumstances, has the implied right and power to execute notes, one to whom they are offered in the market has a right to presume that they were issued under the circumstances which gave the requisite authority.” 8 *Corpus Juris*, 522. *Cooke v. Faucett*, 35 Ga. App. 209, 132 S. E. 268.

§ 3176. (§ 2647.) Surviving partner.

Statute of Limitations.—After the dissolution of a partnership by death of one of the partners, the statute of limitations does not commence to run in favor of the surviving partner against the estate of the deceased partner as long as there are debts due by the partnership to be paid, or debts due it to be collected, or until a sufficient time has elapsed since the dissolution of the firm to raise the presumption that all debts due from the partnership have been paid, and that all debts due to it have been collected. *Purvis v. Johnson*, 163 Ga. 698, 137 S. E. 50.

It will be presumed that, before the expiration of a period of nine years, all debts due by the firm had been paid and those due to the firm had been collected; and tolling from the statute of limitations the five years allowed for the taking out of administration upon the estate of the deceased partner, the suit as to an accounting for the personal assets of the partnership, which was not brought within four years of the expiration of the five-year period, was barred. *Purvis v. Johnson*, 163 Ga. 698, 137 S. E. 50.

ARTICLE 3

Rights and Liabilities of Partners to Third Persons

§ 3180. (§ 2651). Bound by acts of partner.

Ostensible Partner.—Where one allows the continued use of his name as partner after retiring from a particular business, and thereby induces another to deal with the business as a partnership, such ostensible partner will be estopped to deny the partnership relation as to acts within the ordinary scope of such business under § 3157. But, in order to hold the ostensible partner liable, the contract must be in relation to and in the scope of that particular business or adventure which the retiring partner knowingly allowed, under this section and § 3182. *Leidy v. Gould*, 37 Ga. App. 410, 140 S. E. 400.

§ 3188. (§ 2659). Power after dissolution.

See under section 3164 note “Notice to Creditor.”

Applied in *Clark v. Tennessee Chemical Co.*, 167 Ga. 248, 145 S. E. 73.

§ 3190. (§ 2661). Garnishment on partner's interest.

Not Limited to Judgment Creditor.—The right of a creditor to subject to the process of garnishment his

debtor's interest in a partnership is not limited to a judgment creditor only; but the debtor's interest in the partnership assets may be reached by a garnishment issued on a suit pending against the debtor. *Oscilla Grocery Co. v. Wilcox Ives & Co.*, 37 Ga. App. 718, 141 S. E. 822.

A judgment against a partner is not a lien upon his individual interest in the firm property, and such interest is not liable to levy and sale under execution upon such judgment, even after dissolution, but must be reached by process of garnishment. *Citizens Bank & Trust Co. v. Pendergrass Banking Co.*, 164 Ga. 302, 138 S. E. 223.

CHAPTER 2

Debtor and Creditor

ARTICLE 1

General Principles

SECTION 1

Relation Defined, etc.

§ 3216. (§ 2687). Rights of creditors favored.

See notes to § 5419.

§ 3217. (§ 2688.) Equitable assets.

What Would "Jeopard the Collections."—To refuse equitable interference by appointment of a receiver for devisee's interest in vested remainder, in suit by his creditors against executor would "jeopard the collections" of debts, within the meaning of this section. *Bank of Statesboro v. Waters*, 165 Ga. 848, 851, 142 S. E. 156.

Insurance Policy.—The cash surrender and cash loan value of a policy of life insurance accruing at the end of a specified tontine period is not subject to garnishment by creditors of the insured; nor will such value be made available to the judgment creditor of the insured by a court of equity in proceedings instituted for the purpose of obtaining equitable relief analogous to a process of garnishment at law. *Farmers, etc., Bank v. National Life Ins. Co.*, 161 Ga. 793, 131 S. E. 902.

§ 3220. (§ 2691). Compulsory election.

Sale under Power in Security Deed.—This is not applied to restrain sale under power in security deeds, where equity in lands is set apart as year's support. *Redman v. Thaxton*, 167 Ga. 646, 146 S. E. 445.

SECTION 2

Statute of Frauds

§ 3222. (§ 2693.) Obligations which must be in writing.

Statute Must Be Plead.—A plea necessary to make defense under. *Smith v. Marbut-Williams Lumber Co.*, 37 Ga. App. 239, 139 S. E. 590.

Particular Promises Held within Provision.—Oral promise held within the statute, where creditor of A, to induce B to lend money to A for payment of the debt, promised B to reimburse him if A failed to do so. *Scheuer Brothers & Co. v. Hushinsky*, 37 Ga. App. 318, 140 S. E. 394.

An agreement to indorse the notes of another, given in payment of the latter's debt to a third person, must com-

ply with the requirements of this section. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 548, 141 S. E. 653.

Statute Makes Contract Unenforceable Merely.—A parol contract unenforceable by reason of the statute of frauds is nevertheless a valid, subsisting contract as between persons other than the contracting parties, for purposes other than a recovery upon it. *Waynesboro Planing Mill v. Perkins Mfg. Co.*, 35 Ga. App. 767, 134 S. E. 831. And therefore the fact that a contract may be required by the statute of frauds to be in writing will not preclude the establishment of its contents by parol, where it has not in fact been reduced to writing. *Id.*

Presumption That Contract Is Written.—See *Beasley v. Howard*, 34 Ga. App. 102, 128 S. E. 203, citing *Kiser Company v. Padrick*, 30 Ga. App. 642, 118 S. E. 791. *Bank v. Lovvorn Grocery Co.*, 34 Ga. App. 772, 131 S. E. 301, citing *Ansley v. Hightower*, 120 Ga. 719, 48 S. E. 197, following statement made under this catchline in Georgia Code of 1926.

Promise Not within Provision.—Promise to Pay Physician.—Where a physician renders professional services to a minor child of a tenant, solely upon the credit of the landlord's promise to pay for such services, the promise is an original and not a collateral undertaking, and is not within the statute of frauds. *Pope v. Ellis*, 34 Ga. App. 185, 129 S. E. 11.

Same.—Agreement to Collect or "Guarantee" Loan.—Neither an agent's promise to collect a loan nor an agreement, as a part of a contract of agency, to "guarantee" it, constitutes a promise to answer for the debt, default, or miscarriage of another, and the statute of frauds is not applicable. *Benton v. Roberts*, 35 Ga. App. 749, 134 S. E. 846.

Contract Partly in Writing.—A contract for the sale of land, which is partly in writing and partly in parol, is not enforceable, by reason of the statute of frauds. *Thompson v. Colonial Trust Co.*, 35 Ga. App. 12, 131 S. E. 921.

Contract for Resale of Land.—A contract to resell land to the original seller is a contract for the sale of land which comes under the statute of frauds. *Amerson v. Cox*, 35 Ga. App. 83, 132 S. E. 105.

Optional Contract Included.—An option to purchase rented premises is a contract required by the statute of frauds to be in writing by this section. *Robinson v. Odom*, 35 Ga. App. 262, 133 S. E. 53. See also *Kennington v. Small*, 36 Ga. App. 176, 136 S. E. 326.

Joint Adventure in Lands Not within Section.—An agreement to enter a joint adventure for the purpose of dealing in lands into which one is to put property and another his service, and which does not contemplate a transfer of title is not within the statute, notwithstanding it may be intended that as an incident of the enterprise one of the parties may take title to lands for the benefit of both. *Manget v. Carlton*, 34 Ga. App. 556, 130 S. E. 604.

Contract of Resale.—See *Singer Company v. Gray & Son*, 34 Ga. App. 345, 129 S. E. 555, following the principle stated under this catchline in the Georgia Code of 1926.

Sufficiency of Writing.—All that the statute of frauds requires is written evidence of the agreement. The memorandum may even consist of entries made by the party to be charged on his or his agent's books. So entries in the records of a corporation may prove a contract by it. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 548, 141 S. E. 653.

Every essential element of a sale must be expressed in writing to meet the requirements of this section. *Tippins v. Phillips*, 123 Ga. 415, 417, 51 S. E. 410; *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 544, 141 S. E. 653.

Where a party relies upon a written memorandum, it must show, not only the terms of the contract, but also that both parties assented to those terms. It is not necessary that both parties assent in writing, but the writing must show that both parties assented. Otherwise the writing does not evidence a contract. *In re Hartley (Ga.)*, 29 Fed. (2d) 916, 918.

Implied Trust.—Parol evidence held insufficient, as to payment of purchase-price of land, to raise implied trust. *Scott v. Williams*, 167 Ga. 386, 388, 145 S. E. 651.

Lease.—A contract sought to be canceled in this proceeding, purporting to be a lease of real estate for a period of seven years, falls under this section. *Baxley Hardware Co. v. Morris*, 165 Ga. 359, 140 S. E. 869.

Agreement between maker of security deed and grantee therein, as to bidding in the property at sale under power therein, for the purpose of perfecting sale between them and defeating and delaying liens of other creditors, was illegal and not enforceable. *Chenoweth v. Williams*, 39 Ga. App. 347, 147 S. E. 180.

Sufficiency of Writing Letters Acknowledging Terms.—See *Edison v. Plant Bros. & Co.*, 35 Ga. App. 683, 134 S. E. 627, following the principle stated under this catchline in the Georgia Code of 1926.

Correspondence between opposing counsel was properly

admitted as tending to prove the existence of the contract sued on and that such contracts were consequently not within the statute. *Garrard v. Oil Co.*, 35 Ga. App. 137, 132 S. E. 234.

Applied in *Scheuer Brothers & Co. v. Hushinsky*, 37 Ga. App. 318, 140 S. E. 394.

Applied also in *Gregg v. Hall*, 164 Ga. 628, 139 S. E. 339.

Stated in *Beasley v. Howard*, 34 Ga. App. 102, 128 S. E. 203.

§ 3223. (§ 2694.) Exceptions.

Purchase of Lease.—Oral agreement to buy land if vendor would buy an outstanding turpentine timber lease thereon, not taken out of the statute by his purchase of the lease, nor by the fact that, relying on the agreement and in accordance with vendee's instructions, he omitted to cultivate the land. *Schadmann v. Durrence*, 37 Ga. App. 640, 141 S. E. 331.

Agreement Not to Levy on Crop.—An oral agreement, based on a consideration, not to levy on a crop is enforceable where there has been performance and acceptance. *Armstrong v. Reynolds*, 36 Ga. App. 594, 137 S. E. 637.

When Whole Performance Necessary to Prevent Fraud.—See *Bank v. Winter Inc.*, 161 Ga. 898, 905, 132 S. E. 422, following the principle stated under this catchline in the Georgia Code of 1926.

Contracts for the Sale of Goods, etc.—Performance by a creditor making delivery, and acceptance by the debtor of such delivery, of goods in accordance with the terms of an oral contract will take the same without the statute. *Pafford v. Hinson & Co.*, 34 Ga. App. 73, 128 S. E. 297.

Fruit Packed and Shipped.—See *Nellis & Co. v. Houser*, 35 Ga. App. 33, 132 S. E. 142, following the principle stated under this catchline in the Georgia Code of 1926.

Goods Specially Made.—The special manufacturing of goods done in compliance with the intent and purpose of the order, and within the time specified, amounts to such part performance of the contract on the part of the vendor as would render it a fraud on the part of the vendee to refuse acceptance. *Edison v. Plant Bros. & Co.*, 35 Ga. App. 683, 134 S. E. 627.

Stated in *Gragg v. Hall*, 164 Ga. 628, 139 S. E. 339.

Applied in *Kennington v. Small*, 36 Ga. App. 176, 136 S. E. 326.

Applied also in *Baxley Hardware Co. v. Morris*, 165 Ga. 359, 140 S. E. 869; *Home Mixture Guano Co. v. McKeone*, 168 Ga. 317, 147 S. E. 711.

ARTICLE 2

Acts Void as against Creditors

§ 3224. (§ 2695.) Void acts.

I. IN GENERAL.

Conveyances, though void under this section as to creditors and the other persons designated, are good between those above designated. *Gunn v. Chapman*, 166 Ga. 279, 142 S. E. 873, citing *Jones v. Dougherty*, 10 Ga. 273; *Tufts v. DuBignon*, 61 Ga. 322(5).

This section having reference to conveyances and transfers in fraud of "creditors and others," can not be invoked by one who was not a creditor of the party whose conveyance or transfer was attacked and who held no rightful claim or demand against him, but who was, on the contrary, a mere debtor of such party. *Gunn v. Chapman*, 166 Ga. 279, 142 S. E. 873; *Massell v. Fourth National Bank*, 38 Ga. App. 601, 144 S. E. 806; *Mobley v. Merchants & Planters Bank*, 157 Ga. 658(3), 122 S. E. 223; *Mitchell v. Langley*, 148 Ga. 244, 246, 96 S. E. 430; *Peck v. Calhoun*, 38 Ga. App. 764, 145 S. E. 528.

Applied in *Davenport & Broadhurst v. Wood*, 166 Ga. 365, 143 S. E. 398; *Seagraves v. Couch*, 163 Ga. 38, 147 S. E. 61.

Applied also in *Gunn v. Chapman*, 166 Ga. 279, 142 S. E. 873; *Young v. Cochran Banking Co.*, 166 Ga. 877, 144 S. E. 652.

III. CHARACTER OF TRANSACTION AND BADGES OF FRAUD.

Conveyance to Oneself as Trustee.—The making of a deed by a person as an individual to himself in his representative capacity, the deed being for land in which he has a contingent remainder, is, on insolvency, sufficient evidence on

which to base a verdict that the deed was executed with the intent to hinder and delay collection of the grantor's other debts. *Eberhardt v. Bennett*, 163 Ga. 796, 806, 137 S. E. 64.

Evidences of Fraud.—"Failure to produce testimony is a badge of fraud, where the bona fides of the transaction is in issue, and witnesses who ought to be able to explain it are in reach." *Eberhardt v. Bennett*, 163 Ga. 796, 806, 137 S. E. 64.

Same—Disposing of Entire Property.—See *Eberhardt v. Bennett*, 163 Ga. 796, 806, 137 S. E. 64, citing and following the statement in the first paragraph under this catchline in the Georgia Code of 1926.

§ 3226. Merchandise, how sold in bulk.

I. GENERAL CONSIDERATION.

Purpose of Sections.—This section is for protection of then existing creditors, who are to be notified, and in absence of fraud such sale cannot be attacked by subsequent creditors for noncompliance with this act. *Dodd v. Raines*, 1 Fed. (2d), 658.

Sufficiency of Presumption of Fraud to Avoid Transfer in Bankruptcy.—To entitle a trustee to recover property as transferred by bankrupt within four months with intent to defraud creditors, under Bankruptcy Act, section 67e (Comp. St. section 9651), there must be proof of actual intent to defraud, and a presumption of fraud raised by this statute is not sufficient. *Dodd v. Raines*, 1 Fed. (2d). 658.

II. APPLICATION OF SECTION.

No Distinction between Creditor.—This section draws no distinction between those creditors whose debts may have arisen from sales of merchandise and such creditors as sustain that relation by reason of indebtedness created by the debtor for other independent and disassociated reasons. It applies as well to a sale of a stock of goods in bulk by a debtor to a creditor in extinguishment of his debt as to a sale for cash or on credit. *Anderson v. Merchants, etc., Bank*, 161 Ga. 12, 129 S. E. 650.

Part of Stock.—A sale or transfer of a stock of goods, wares, or merchandise may amount to a fraud, under the bulk-sales, although only a part of the stock be sold, where the sale, is "out of the usual or ordinary course of the business or trade of the vendor." *Goodman v. Clarkson*, 39 Ga. App. 383, 147 S. E. 183.

CHAPTER 3

Preferences and Assignments for Benefit of Creditors

§ 3230. (§ 2697.) Legal preference.

Methods of Preferring Creditors—Good Faith.—See *Bank v. Ellison*, 162 Ga. 657, 134 S. E. 751, citing and following the statement in the second paragraph under this catchline in the Georgia Code of 1926.

Bankrupt Debtor.—A voluntary bankrupt having an assignable interest in the property claimed by him in his petition as exempt under the constitution and homestead laws of this state can transfer this interest in good faith to his creditor either in extinguishment of, or to secure, a pre-existing debt, before the property is set aside by the trustee in bankruptcy, and before the same is confirmed by the bankrupt court. *Silver v. Chapman*, 163 Ga. 604, 136 S. E. 914.

When Right to Prefer Extinguished.—The right of the debtor to prefer one creditor to another in a bona fide transaction continues up to the date when a judgment or lien is obtained against him. The mere pendency of a suit does not extinguish that right to prefer. *Bank v. Ellison*, 162 Ga. 657, 134 S. E. 751.

CHAPTER 5

Mortgages

ARTICLE 1

General Principles

§ 3256. (§ 2723.) What is a mortgage, and what it may embrace.

I. GENERAL CONSIDERATIONS.

Distinguished from Security Deed.—A statutory mortgage in this State does not convey title, but only creates a lien on property. A statutory security deed conveys title to property as security, and is expressly declared to be "not a mortgage." The latter has been declared to be in effect an equitable mortgage, but vastly different rights arise from the effect of the two classes of security. *Carmichael v. Citizens, etc., Bank*, 162 Ga. 735, 134 S. E. 771; *Bank v. Beard*, 162 Ga. 446, 134 S. E. 107.

The objects of a mortgage and security deed and a bill of sale to personalty under the provisions of the Code are identical—security for debt. While recognizing the technical difference between a mortgage and security deed and as hereinbefore pointed out, the court has treated deeds to secure debts and bills of sale to secure debts as equitable mortgages. *Bank v. Beard*, 162 Ga. 446, 134 S. E. 107. See also *Hill v. Smith*, 163 Ga. 71, 135 S. E. 423.

III. AFTER ACQUIRED INTEREST AND INCREASE.

General Rule.—See *Dunson Co. v. Cotton Mills*, 34 Ga. App. 768, 131 S. E. 186, citing and following the statement in the last paragraph under this catchline in the Georgia Code of 1926.

Same—Bill of Sale to Secure Debt.—The object of the statute was to devise a practical means to enable owners of such class of property to use it as a security. The statute should be construed in this light; and when so construed, giving due effect to substance as compared to form, the provision as to after acquired property is sufficient to include bills of sale to secure debt, though not expressly named therein. *Bank v. Beard*, 162 Ga. 446, 134 S. E. 107. See note of this Case under § 3306.

§ 3257. Form and execution.

See notes to § 3318.

§ 3258. (§ 2725.) Reducing deed to mortgage.

Possession—Effect of Possession in Vendor.—See *Sims v. Sims*, 162 Ga. 523, 134 S. E. 308, citing and following the law as stated under this catchline in the Georgia Code of 1926.

Under this section, a deed absolute on its face can only be shown by parol evidence to have been intended to convey title only for the purpose of securing debt, where the grantee has not been put in possession of the property. *Pitts v. Cox*, 167 Ga. 228, 145 S. E. 61, citing *Askew v. Thomas*, 129 Ga. 325, 58 S. E. 854; *Mercer v. Morgan*, 136 Ga. 632, 71 S. E. 1075; *Berry v. Williams*, 141 Ga. 642, 81 S. E. 881; *Copelin v. Williams*, 152 Ga. 692, 111 S. E. 186.

Deed to Secure Debt.—There is nothing in this section of the Code which will prevent an assignee of the grantee who in an absolute deed conveyed to his wife the land thereby conveyed from treating it as a deed to secure debt, and, upon payment of the money thereby secured, reconveying the land to the grantor. *Pitts v. Cox*, 167 Ga. 228, 145 S. E. 61.

A deed absolute in form may be shown to have been made to secure a debt, where the maker remains in possession of the land; but where the grantee in a deed or bill of sale absolute on its face is in possession of the property, such muniment of title shall not be proved (at the instance of the parties) by parol evidence to be only a mortgage, unless fraud in its procurement is the issue to be tried. In this case the maker of the deed absolute in form had surrendered possession to the grantee, and the latter was in possession at the time of the filing of the petition. *Durden-Powers Co. v. O'Brien*, 165 Ga. 723, 142 S. E. 90.

While the issue as to what was the true intent of the parties in the execution of a written instrument is frequently for the determination of a jury, who, upon consideration of all the facts and circumstances, are to determine whether a certain writing evidences an absolute conveyance or a mere security for the payment of a loan, nevertheless the construction of unambiguous contracts in writing is for the court, and in the state of the pleadings in this case the contracts attached as a part of the petition were so plain and unambiguous as not to require the intervention of a jury. *Durden-Powers Co. v. O'Brien*, 165 Ga. 728, 142 S. E. 90.

§ 3259. (§ 2726.) Registry.

Where a contract which, under the rules of the governing common law, must be construed by the courts of this State as one of conditional sale is executed in an-

other State, and the property is brought into this State, the reservation of title in the seller is not effective as against one who in good faith has here acquired title to the property without actual notice of such reservation, unless the contract was duly recorded as required by this section and section 3319. *Olmstead v. Carolina-Portland Cement Co.*, 30 Ga. App. 126, 117 S. E. 255; *Burgsteiner v. Street-Overland Co.*, 30 Ga. App. 140 (4), 143, 117 S. E. 268; *Motors Mortgage Corp. v. Purchase-Money Note Co.*, 38 Ga. App. 222, 143 S. E. 459.

§ 3261. (§ 2728.) How admitted in evidence.

Cited in *Steiner v. Blair*, 38 Ga. App. 753, 145 S. E. 471.

§ 3262. (§ 2729.) Defective record.

See notes to § 3307.

§ 3268. (§ 2735.) Debt barred, mortgage may still be foreclosed.

See note to § 4359.

§ 3270. (§ 2737.) Cancellation of mortgage.

Stated in *Ellis v. Ellis*, 161 Ga. 360, 130 S. E. 681.

Cited in *Blumenfeld v. Citizens Bank, etc., Co.*, 168 Ga. 327, 147 S. E. 581.

ARTICLE 2

Mortgages on Real Estate, How Enforced

SECTION 1

Application to Foreclose; When, Where, and How Made, and Proceedings Thereon

§ 3278. (§ 2745.) Transferee may foreclose, how.

Evidence Justifying Recovery.—In a suit upon a mortgage note, instituted by the payee for the use of an assignee, where it appears that the assignee is the holder of the legal title, the assignee is the real party at interest. Although the petition may not be amended by striking the name of the nominal party plaintiff and substituting therefor the name of the assignee as plaintiff, there may nevertheless be a recovery for the plaintiff upon evidence which sustains only the right of the assignee to recover, where such evidence has been admitted without objection. *Carden v. Hall*, 34 Ga. App. 806, 131 S. E. 296.

ARTICLE 3

Of Mortgages on Personal Property, and Bills of Sale to Secure Debts, How Foreclosed

SECTION 1

Application to Foreclose, by Whom and How Made

§ 3292. (§ 2759.) Mortgaged property, when sold without foreclosure.

Estoppel to Deny Consent.—Where the holder of the subsequent mortgage failed to question the legal right of the other holder to intervene in a proceeding for distribution of process from a foreclosure without foreclosing her mort-

gage, and where the jury found against the holder of the subsequent mortgage, and judgment was entered in favor of the other holder, the holder of the subsequent mortgage will not be heard to insist for the first time that it is illegal because the earlier mortgage had not been foreclosed and no equitable reason for claiming the fund derived from a sale under the subsequent mortgage was set out in the intervention. *Bank v. Goolsby*, 34 Ga. App. 217, 129 S. E. 8.

§ 3296. (§ 2763). Mortgagor to have notice.

This section is applicable to justice courts, and not to superior courts; and in the case at bar the trial court correctly overruled the motion to dismiss the levy based upon this section. *Golden v. Easteling & Sons*, 37 Ga. App. 172, 139 S. E. 102.

Remedy Not Exclusive.—In a contract for the sale of personal property, where the purchaser agrees that upon default in any payment due under the contract he will voluntarily surrender the property to the seller, to be sold and the proceeds applied upon the indebtedness, or agrees that upon such default the seller may institute trover proceedings to recover the property, etc., these remedies are cumulative of the seller's right to collect the indebtedness in any other manner as provided by law; and the seller's failure to pursue, for the collection of the indebtedness, any method prescribed in the contract for that purpose, can not be a defense against the seller's right to foreclose as provided by law under this section. *Jones Motor Co. v. Macon Savings Bank*, 37 Ga. App. 767, 142 S. E. 199.

Not Essential That Holder of Legal Title Convey Same to Debtor.—The 1921 amendment of this section has reference to contracts retaining title in the seller of personal property sold to secure the purchase money. It is not essential to the validity of a levy upon personal property, made pursuant to this code section, that the holder of the legal title as security for the debt shall convey the title to the debtor for the purpose of levy and sale. A levy upon personal property in a proceeding to foreclose a retention-of-title contract, made pursuant to this code section, was a legal levy although the title was not put into the debtor for the purpose of levy and sale. *Jones Motor Co. v. Macon Savings Bank*, 37 Ga. App. 767, 142 S. E. 199.

Effect of 1921 Amendment.—In the passage of the act of 1921, amendatory of this section the General Assembly did not purport or intend to change or affect the nature of the instrument mentioned in the Code section, or to transform an instrument retaining title into a mere mortgage; but it was the purpose of the General Assembly, and within its power, to provide, as it did, another method to enforce the collection of debts where title is retained, by providing that the owner of any bill of sale to personal property to secure a debt, or written contract where title is retained to personal property to secure a debt, may foreclose the same in the same manner as mortgages on personal property are foreclosed. *Macon Savings Bank v. Jones Motor Co.*, 168 Ga. 805.

The provision of the act of 1921 referred to in the preceding head note does not suggest or require that the owner of a bill of sale to personal property shall convey or reconvey to the debtor the personal property covered by such bill of sale, prior to the foreclosure of his contract in the manner in which mortgages are foreclosed, or the recordation of such a conveyance as provided in section 6037 of the Code of 1910. The remedies provided by section 3298 and that provided by section 6037 are distinct and altogether independent of each other. *Macon Savings Bank v. Jones Motor Co.*, 168 Ga. 805.

The setting aside of the property afterwards, as being exempt from levy and sale by virtue of the homestead and exemption laws, in no wise affected the previously acquired title of the lender. Where, after a levy upon the property under a proceeding to foreclose the bill of sale as provided in section 3298 of the Civil Code of 1910 as amended by an act approved August 15, 1921 (Ga. L. 1921, p. 114), the borrower filed a claim to the property, upon the ground that it was exempt from levy and sale by virtue of the homestead and exemption laws, and where it appeared from the claim filed that the property levied upon was impressed with exemption after the borrower had executed the bill of sale to secure the debt to the lender, the court did not err in dismissing the claim on demurrer and allowing the levy to proceed. *Tarver v. Beneficial Loan Society of Macon*, 39 Ga. App. 646, 148 S. E. 288.

SECTION 2

Of Defenses, When and How Made

§ 3301. (§ 2766.) Replevy bond.

Failure to Give Proper Bond or Affidavit.—See *Bridges v. Melton*, 34 Ga. App. 480, 129 S. E. 913, citing and following the statements made under this catchline in the Georgia Code of 1926.

CHAPTER 6

Sales to Secure Debts

§ 3306. (§ 2771.) Absolute deeds and not mortgages.

I. GENERAL CONSIDERATIONS.

Distinguished from Mortgage.—See notes to § 3256.

Applies to Both Realty and Personalty.—A bill of sale of personalty to secure a debt stands on the same footing as a deed to realty to secure a debt. The status of each is provided for in this section. *Bank v. Beard*, 162 Ga. 446, 448, 134 S. E. 107.

Attaches to After-Acquired Property.—Where a bill of sale on an ordinary stock of merchandise changing in specifics is executed merely to secure a debt, the bill of sale will attach to after-acquired portions of the stock as in case of mortgages, whether or not the bill of sale makes express reference to such after-acquired property. *Bank v. Beard*, 162 Ga. 446, 134 S. E. 107. See note of this case under § 3256.

The expression "personal property," as used in this section includes choses in action as well as visible, tangible personal property. *Garrard v. Milledgeville Banking Co.*, 168 Ga. 339, 343, 147 S. E. 766.

Applied in *Tarver v. Beneficial Loan Society of Macon*, 39 Ga. App. 646, 148 S. E. 288.

II. DETERMINING WHETHER INSTRUMENT IS MORTGAGE OR DEED TO SECURE DEBT.

Distinctions.—See notes to § 3256.

IV. LIEN OF SECURITY DEED, FI. FA. AND PRIORITIES.

Priorities.—See *Bank v. Ins. Co.*, 163 Ga. 718, 721, 137 S. E. 53, following the statement made under this catchline in the Georgia Code of 1926.

V. RIGHTS OF GRANTOR AND CREDITOR.

Interest of Grantor.—The grantor in a deed under this section retains the right of possession and the right of redemption by payment of the debt, and consequently an equitable estate in the land which may be assigned or subjected to payment of his debts. *Citizens & Southern Bank v. Realty, etc., Co.*, 167 Ga. 170, 171, 144 S. E. 893; *Uvalda Naval Stores Co. v. Cullen*, 165 Ga. 115, 117, 139 S. E. 810.

Timber Rights.—A deed under this section passes the title to the land and the timber growing thereon to the vendee therein. *Ponder & Co. v. Mutual Benefit Life Ins. Co.*, 165 Ga. 366, 140 S. E. 761.

VI. TRANSFER OR ASSIGNMENTS.

Rights of Transferee.—A transferee of the grantee named in the security deed occupies the position of such grantee as against the grantor and those claiming under him. *Gilliard v. Johnston*, 161 Ga. 17, 129 S. E. 434.

VII. FORECLOSURE.

Where security deed, executed subsequent to two deeds to secure debt, subsequent security deed was made to secure an indebtedness represented by a promissory note, under this section and on its face recited the debt and the purpose to secure it, the creditor could foreclose the deed as an equitable mortgage, although the grantor therein had been discharged as a bankrupt from the payment of his debts. *Smith v. Farmers Bank*, 165 Ga. 470, 141 S. E. 203, citing *Pusser v. Thompson*, 132 Ga. 280, 64 S. E. 75, 22 L. R. A. (N. S.) 571.

§ 3307. (§ 2772.) Record of such deeds.

Necessity for Record.—A "bill of sale" as contemplated by this section is a "deed" to personalty, and is included in the

meaning of the word "deeds" as employed in section 3320; and consequently under that law bills of sale to secure debt are required to be recorded. *Bank v. Beard*, 162 Ga. 446, 451, 134 S. E. 107.

Defective Record.—Construing section 3262 with this section a defective record of security deed will be equivalent to no record, and, in the language of this section, it will "remain valid against the persons executing" it, but will be "postponed to all liens created or obtained, or purchases made, prior to" a legal record of the security deed. *Bank v. Ins. Co.*, 163 Ga. 718, 722, 137 S. E. 53.

The words "liens created or obtained," as employed in the section, have been held to refer to liens arising by contract, and not by operation of law. *Donovan v. Simmons*, 96 Ga. 340, 22 S. E. 966; *Griffeth v. Posey*, 98 Ga. 475, 25 S. E. 515; *Bank v. Beard*, 162 Ga. 446, 450, 134 S. E. 107.

The language, "all liens created or obtained," in this section of the Civil Code, embraces both liens created by contract and arising by operation of law. Under that section a common-law judgment against a grantor, obtained after the execution of a security deed by him, and entry of the execution from such judgment on the general execution docket within ten days from its rendition, but before the actual record of the security deed, is superior to such deed. *Saunders v. Citizens First Nat. Bank*, 165 Ga. 558, 142 S. E. 127; *Saunders v. Citizens First Nat. Bank*, 38 Ga. App. 141, 142 S. E. 734.

Priority of lien of judgment duly recorded over earlier security deed recorded afterward. *Saunders v. Citizens Bank*, 165 Ga. 558, 142 S. E. 127.

Security deed superior to debt outstanding evidenced by unrecorded deed. *Mortgage Co. v. Bank*, 166 Ga. 412, 415, 143 S. E. 562.

Where Recorded.—A retention-of-title contract attested by a person described as a commercial notary public of L. county, although the caption of the instrument indicates that it was executed in a town in W. county is presumably officially executed in L. county. It nevertheless is legally executed to record in W. county, the residence of the maker. *Smith v. Simmons*, 35 Ga. App. 427, 133 S. E. 312.

No Prior Lien for Money Judgment unless Execution Entered.—Applying this section, as modified by sections 3320 and 3321, a money judgment against the grantor or maker of a bill of sale to secure a debt would not have a lien as against third parties or those claiming under the bill of sale, unless an execution issuing on the judgment should be entered on the execution docket. Consequently a junior money judgment upon which no execution was issued and placed on the execution docket would not create a lien within the meaning of this section, to which the bill of sale therein referred to could be postponed. *Bank v. Beard*, 162 Ga. 446, 452, 134 S. E. 107.

Priority between Bill of Sale and General Execution.—Where a bill of sale to secure a debt as provided in this section, is executed and subsequently recorded, whether or not such recording should occur within thirty days after the date of the execution of the paper, such bill of sale is superior in dignity to a subsequently obtained unrecorded general execution. *Bank v. Beard*, 162 Ga. 446, 453, 134 S. E. 107.

The status of a recorded bill of sale to secure a debt, which was not recorded until after the time provided by law, is inferior in dignity to a subsequently obtained execution which was recorded prior to the record of the bill of sale. *Bank v. Beard*, 162 Ga. 446, 454, 134 S. E. 107.

Same—Record from Time of Filing.—In a contest between a bill of sale to secure a debt and a lien of a subsequently recorded general execution, the record of the bill of sale dates back from the time of its filing for record in the office of the clerk of the superior court. *Bank v. Beard*, 162 Ga. 446, 455, 134 S. E. 107.

Same—Same—Fractions of a Day.—Where a priority as between a bill of sale to secure a debt and the lien of a subsequently recorded general execution depends upon whether the bill of sale was recorded first or the general execution was entered upon the execution docket first, such recording and such entry upon the execution docket having occurred on the same day, in determining such priority fractions of a day are to be considered. *Bank v. Beard*, 162 Ga. 446, 134 S. E. 107.

§ 3309. (§ 2774.) To reconvey title of property conveyed to secure debts.

As to the distinction between a security deed and a mortgage, see note under section 3256.

Effect of Failure to Record Cancellation.—If record of cancellation is not effected according to this section, the security deed appearing of record to be valid, a purchaser with-

out notice acquires title. *Ellis v. Ellis*, 161 Ga. 360, 362, 130 S. E. 681.

Not Affected by Grantee.—In *Massell v. Fourth Nat. Bank*, 38 Ga. App. 601, 605, 144 S. E. 806, it is said: "Furthermore, upon payment of the debt defendant will have his remedy, regardless of the position or attitude either of the plaintiff or of the grantee in the security deed."

Cited in *Blumenfeld v. Citizens Bank, etc., Co.*, 163 Ga. 327, 334, 147 S. E. 581.

See notes to § 3259.

§ 3310. (§ 2775.) Liens against vendee do not attach to the property.

In General.—The right of the mortgagee under this section, will be defeated by the payment of the secured debt, either by the vendor or his assignee. *Gilliard v. Johnston & Miller*, 161 Ga. 17, 129 S. E. 434.

CHAPTER 8

Conditional Sales

§ 3318. (§ 2776.) Conditional sales, how executed.

I. IN GENERAL.

History.—The provision of section 1 of the act of September 30, 1885 (Acts 1884-5, p. 124), which permitted all deeds to realty and all bills of sale to personalty, made to secure debt, to be recorded within thirty days from their date, was repealed by the act of October 1, 1889 (Acts 1889, p. 106), now embodied in this section. *Saunders v. Citizens First Nat. Bank*, 165 Ga. 558, 142 S. E. 127; *S. C.* 389 Ga. App. 141, 142 S. E. 744.

Object of Section.—This section is in the nature of a statute of frauds and outlaws all reservations of title as against third persons where the contract is not written. The words "third parties" include creditors, but are not restricted to them, and are to be construed literally. *Flemming v. Drake*, 163 Ga. 872, 137 S. E. 268.

Effect of Failure of Clerk to Perform Duty.—Under this section of the code, all that is required of the grantee and all that he can do is to file his deed for record. The actual recording is the duty of the clerk, and the statute does not contemplate that a failure on the part of the clerk to perform this duty or an erroneous performance of it shall operate to defeat the grantee who has properly filed his deed." *Willie v. Hines-Yelton Lumber Co.*, 167 Ga. 883, 891, 146 S. E. 901, citing *Durrence v. Northern Nat. Bank*, 117 Ga. 385, 386, 43 S. E. 726; *Greenfield v. Stout*, 122 Ga. 303, 50 S. E. 111.

II. FORM AND REQUISITES.

A. Writing, Execution, etc.

Description of Property.—The rights of a third party, acquiring title in good faith from the vendee, are protected, where the record of the alleged conditional sale shows on its face that not only was no particular property described, but that at the time the instrument was signed no particular property was in the minds of the parties, and that consequently no attempt was or could have been made by the instrument to specify or even refer to any particular property. *Stevens Hdw. Co. v. Bank*, 34 Ga. App. 268, 129 S. E. 172.

Same—Parol Evidence.—Under this section and § 3257, parol evidence is admissible to apply a description to the subject-matter and identify the property, but the writing must contain the key to the description. Parol cannot supply a necessary element of the description. If the property is described as a counter sold to a named person, it is permissible to show by parol that only one counter was sold, and to point out that counter; but it is not permissible to supply the description by parol by showing first that a counter was sold and then identifying the counter. *In re Hartley (Ga.)*, 29 Fed. (2d) 916, 918.

A description of property in a written order as 1-512-Warren Counter, held insufficient. However, if the paper had described the property as 1-512-Warren Counter, sold by the Warren Company to the purchaser, or bought by him from the Warren Company, the description would have been sufficient, under the holding in *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 879, 48 S. E. 333. *In re Hartley (Ga.)*, 29 Fed. (2d) 916, 918.

Must Be in Writing.—Under this and the following section whenever personal property is sold and delivered with a condition that title shall remain in the vendor until the purchase price is paid, to be valid as against third parties, the contract must be in writing and recorded within thirty days after delivery of the property sold, which is the time when the sale becomes effective under the terms of the statute. *Anglo-American Mill Co. v. Dingler*, 8 Fed. (2d), 493.

Same—Written Order for Goods.—Under this section the sale must be evidenced in writing and the written contract of sale attested. The writing must show that a sale has been made. A written order for goods does not evidence a sale and is not sufficient to effect a valid reservation of title. *In re Hartley* (Ga.), 29 Fed. (2d) 916, 918.

Affidavit of execution of a conditional sale contract by salesman who signed the contract as such and not on the line for attesting witness, held not to entitle it to record, and such contract is not valid as against buyer's trustee in bankruptcy. *In re Hartley* (Ga.), 29 Fed. (2d) 916.

B. PARTICULAR INSTRUMENTS.

Stipulations for Paying Rent or Hire.—Where a written contract provides that the bailee may at any time before the expiration of the period of rental become the purchaser of the property upon the payment of the aggregate rental value, upon which payment he shall receive credit for the payments previously made as rental, the contract constitutes a conditional sale. *Singer Sewing Machine Co. v. Tidwell & Co.*, 36 Ga. App. 525, 137 S. E. 128.

§ 3319. (§ 2777.) How recorded.

I. GENERAL CONSIDERATION.

Necessity of Recordation—Record Necessary Only as against Third Parties.—See II, A, Writing Execution, etc., under the preceding section.

III. PRIORITIES.

A. In General.

Necessity for Recordation.—See *Sewing Machine Co. v. Tidwell & Co.*, 36 Ga. App. 525, confirming the matter set out under this catchline in the Georgia Code of 1926.

CHAPTER 9

Registration of Transfers and Liens

§ 3321. General Execution Docket.—The clerk of the Superior Court of each county shall be required to keep a general execution docket; and as against the interest of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the defendant's property, no money judgment obtained within the county of defendant's residence, in any court of this State, whether superior court, ordinary's court, county court, city court, or justice court, or United States court in this State, municipal court or other courts, shall have a lien upon the property of the defendant from the rendition thereof, unless the execution issuing thereon shall be entered upon said docket within ten days from the time the judgment is rendered. When the execution shall be entered upon the docket after the ten days, the lien shall date from such entry; and in all counties of this State having by the United States Census of 1920, or which may have by any future census a population of more than two hundred thousand inhabitants, the lien shall date only from the time the execution shall have been entered upon such general execution docket. Acts 1929, p. 166, § 1.

Cited in *Burt v. Gooch*, 37 Ga. App. 301, 306, 139 S. E. 912.

§ 3324. (§ 2782). Clerk's fees.

Cited in *Benton v. Benton*, 164 Ga. 541, 546, 139 S. E. 68.

CHAPTER 10

Liens Other than Mortgages

ARTICLE 1

To Whom Granted, Rank and Priority

§ 3329. (§ 2787). Liens established.

The statute of this State, as codified in sections 3329, 3334, and 3339 of the Civil Code of 1910, which gives to laborers a general lien upon the property of their employers for labor performed, has no extra-territorial effect, and gives no lien arising out of a contract for labor, made in another State and executed by labor performed therein. *Downs v. Bedford*, 39 Ga. App. 155, 146 S. E. 514.

§ 3333. (§ 2791.) Rank of liens for taxes.

In General.—Taxes due the State are not only against the owner but against the property also, regardless of judgments, mortgages, sales, transfers, or incumbrances of any kind. *Bibb Nat'l Bank v. Colson*, 162 Ga. 471, 134 S. E. 85. See *Stephens v. First Nat. Bank*, 166 Ga. 380, 143 S. E. 386.

Lien for Paving Streets.—A lien against property owners for the proportionate costs of paving streets has the rank of a tax lien and its dignity takes rank under this section, and consequently takes priority over a prior mortgage. *Brunswick v. Gordon Realty Co.*, 163 Ga. 636, 642, 136 S. E. 898.

Quoted in *Phoenix Mutual Life Ins. Co. v. Appling County*, 164 Ga. 861, 139 S. E. 674.

§ 3334. (§ 2792). Lien of laborers, general.

The statute of this State, as codified in sections 3329, 3334, and 3339 of the Civil Code of 1910, which gives to laborers a general lien upon the property of their employers for labor performed, has no extra-territorial effect, and gives no lien arising out of a contract for labor, made in another State and executed by labor performed therein. *Downs v. Bedford*, 39 Ga. App. 155, 146 S. E. 514.

§ 3335. (§ 2793.) Special lien of laborers.

To What Property Applicable.—The special lien given by this section to laborers, on the product of their labor, attaches to the property of their employers only. *Jones v. Central Georgia Lumber Co.*, 35 Ga. App. 172, 132 S. E. 236.

§ 3336. Laundrymen, liens in favor of.

Applied in *Myrick v. Dixon*, 37 Ga. App. 536, 140 S. E. 920.

§ 3339. (§ 2794). Rank of laborers' liens, and how they arise.

The statute of this State, as codified in sections 3329, 3334, and 3339 of the Civil Code of 1910, which gives to laborers a general lien upon the property of their employers for labor performed, has no extra-territorial effect, and gives no lien arising out of a contract for labor, made in another State and executed by labor performed therein. *Downs v. Bedford*, 39 Ga. App. 155, 146 S. E. 514.

Cited in *Gardner v. Smith*, 39 Ga. App. 224, 146 S. E. 648.

§ 3340. (§ 2795). Landlord's lien.

Discharge in Bankruptcy.—A landlord's lien for rent,

whether the special lien upon the crops grown on the rented premises which is created by this section, or the general lien which arises upon the levy of a distress warrant, is not a lien created by judgment or one "obtained through legal proceedings," and is therefore not, under the bankruptcy act of 1898 (30 Stat. 565), § 67-f, discharged the filing of a petition for the tenant's discharge in bankruptcy, although within four months of the creation of the lien. *Henderson v. Mayer*, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. ed. 1233; *In re Burns*, 175 Fed. 633; *White v. Idelson*, 38 Ga. App. 612, 144 S. E. 802.

§ 3341. (§ 2796). Rank of such lien.

No Conflict With Section 4000.—"This section gives the landlord a special lien for rent on the crops, from the date of the maturity of the crops, on the lands rented. And we do not think there is any conflict between the provisions of this section and section 4000." *Evans v. Carroll*, 167 Ga. 68, 81, 144 S. E. 912.

The debts due for rent, referred to in section 4000, are not debts for rent arising during the year in which the crops upon the rented land are grown, but this provision refers to debts of the decedent arising by contract made by him prior to the time of his death. *Evans v. Carroll*, 167 Ga. 68, 81, 144 S. E. 912.

Crops Raised by Administrators.—The fact that the crop upon which the lien is here asserted was raised upon lands upon which administrators were continuing to conduct the business of the decedent does not deprive the landlord of the special lien provided for under this section. *Evans v. Carroll*, 167 Ga. 68, 81, 144 S. E. 912.

§ 3348. (§ 2800). Liens for supplies, etc., furnished.

As to penalty for giving false information regarding liens under this section see section 713 of the Penal Code.

I. BY AND TO WHOM SUPPLIES FURNISHED.

Landlord as Surety.—See *O'Quinn v. Carter*, 34 Ga. App. 310, 129 S. E. 296, citing and following the statement made under this catchline in the Georgia Code of 1926.

III. CHARACTERISTICS OF LIEN.

Not Affected by Bankruptcy.—See *Sitton v. Turner*, 34 Ga. App. 12, 128 S. E. 77, citing and following the statements under this catchline in the Georgia Code of 1926.

Similar to Claim for Purchase Money.—Under this section, landlords furnishing supplies to their tenants for the purpose of making crops on the rented premises have a lien, by operation of law, on the crops there made in the year for which the supplies were furnished and such a lien is in the nature of a claim for purchase-money. *Mutual Fertilizer Co. v. Moultrie Bkg. Co.*, 36 Ga. App. 322, 136 S. E. 803.

Execution Against Supplies.—*Quaere*: After supplies have been furnished but before they are utilized by the tenant for the purpose intended, are they subject to levy and sale under executions against the tenant held by third persons? *Mutual Fertilizer Co. v. Moultrie Bkg. Co.*, 36 Ga. App. 322, 136 S. E. 803.

Time Lien Attaches.—The lien of a materialman on real estate, under this section, when created and declared as required by § 3353, attaches from the time the materialman commences, under the contract, to deliver material, and takes priority over title acquired with actual notice of the materialman's claim of lien by a subsequent grantee from the owner of real estate to secure debts, although the deed is executed and recorded before the completion of the contract of the materialman to furnish material, and before the claim of lien is recorded, and before the commencement of an action to foreclose the lien or recover the amount of the claim. *Picklesimer v. Smith*, 164 Ga. 600, 139 S. E. 72.

When a contractor or materialman has done work or furnished material for the improvement of real estate, their liens when declared and created, as provided in the Civil Code (1910), § 3353, attach from the time the work under the contract is commenced or the material is furnished, as against third persons having actual notice of such liens. *Marbut-Williams Lumber Co. v. Dixie Electric Co.*, 166 Ga. 42, 142 S. E. 270, citing *Guaranty Investment Co. v. Athens Engineering Co.*, 152 Ga. 596 (5), (6), 110 S. E. 873.

In the light of what has been held above, a contractor's lien under this statute can not attach or exist prior to delivery of any of the material; and it follows that a holder of legal title to realty, under a security deed executed by the owner and duly recorded prior to delivery of material furnished to such owner for improvement of the realty, can

not at the time of taking the security be affected with notice of any lien which the materialman may set up for material furnished to improve the property. *Marbut-Williams Lumber Co. v. Dixie Electric Co.*, 166 Ga. 42, 142 S. E. 270.

Where, after materialmen had furnished material to improve the real estate embraced in the deed above referred to, the owner executes and delivers to the vendee therein a second deed to secure debt, and the vendee takes such second deed with actual notice of the claims of liens by such materialmen, the liens of the materialmen, when created and declared as required by this section 3353 of the Civil Code, would take priority over the title acquired by the vendee in such second security deed. *Picklesimer v. Smith*, 164 Ga. 600, 139 S. E. 72. See notes to 3352.

§ 3353. (§ 2804.) Mechanics' liens, how declared and created.

Waiver of Right to Object to Lien.—An owner who resists foreclosure upon the ground that the material was not such as provided for by the contract may waive the right to assert this defense, and thereby be estopped to dispute evidence on the part of the materialman to the contrary. Acceptance and use of such material without objection or complaint, and payment therefor to another instead of to the materialman, will authorize the conclusion that the owner waived his right and estopped himself. *Rylander v. Koppe*, 162 Ga. 300, 301, 133 S. E. 236.

§ 3354. (§ 2805.) Mechanic's lien on personality.

Enforcement.—See *Young v. Alford*, 36 Ga. App. 708, 137 S. E. 914, citing and following the statement made under this catchline in the Georgia Code of 1926.

§ 3356. (§ 2807.) Liens in favor of planing-mills, etc.

Applied in *Young v. Alford*, 36 Ga. App. 708, 137 S. E. 914.

§ 3364. (§ 2814). Lien of attorneys at law.

Strictly Construed.—Unless the petition in this case sets forth a state of facts which brings the case within the terms of this provision of this section, it must fail as a suit to foreclose a lien. This statute, creating liens in favor of attorneys at law, is in derogation of the common law, and is to be strictly construed. *Middleton v. Westmoreland*, 164 Ga. 324, 328, 138 S. E. 852, citing *Brown v. Georgia, Carolina & Northern Ry. Co.*, 101 Ga. 80, 83, 28 S. E. 634.

Same Lien for Defending and Bringing Suit.—Attorneys at law, employed and serving in defense against suits, have the same liens and means of foreclosure which are allowed to attorneys at law who are employed to sue for any property, if the defense is successful. *Middleton v. Westmoreland*, 164 Ga. 324, 328, 138 S. E. 852.

Contingent Fee.—The mere engagement by a prospective suitor of an attorney at law, upon a contingent fee, does not create a lien for fees in favor of the latter, in the cause of action respecting which he is employed; but upon the filing of a suit by him a lien attaches in his favor in such suit, which the plaintiff and defendant are not at liberty to settle so as to defeat the attorney's claim for fees. *Middleton v. Westmoreland*, 164 Ga. 324, 328, 138 S. E. 852.

§§ 3364(a)-3364(e). Park's Code.

See §§ 3364(1)-3364(5).

§ 3364(1). Jeweler's liens for repair.—It shall be lawful for any jeweler, or other person, firm, or corporation engaged in the business of repairing watches, clocks, jewelry and other articles of similar character, to sell such articles upon which charges for repairs, including work done and materials furnished, have not been paid, which have remained in the possession of such jeweler, person, firm, or corporation, for a period of one year

after the completion of said repairs, for the purpose of enforcing the lien of such jeweler, person, firm, or corporation for materials furnished and work done in repairing such article or articles. Acts 1927, p. 218.

§ 3364(2). Notice before sale.—Before any sale shall be made as provided in section 3364(1), the person, firm, or corporation making such sale shall give thirty days' notice thereof by posting a notice of such sale before the court-house door of the county in which such repairs were made, giving the name of the owner of the article or articles so repaired, if known, and if not known, the name of the person from whom such article or articles were received, a description of the article or articles to be sold, and the name of the person, firm, or corporation making such repairs and proposing to make such sale; and shall also give written notice thereof by sending a registered letter to the last known address of the owner of such article or articles, or the person who left such article or articles for repairs, advising such persons of the time and place of sale, the description of the article or articles to be sold, and the amount claimed by said person, firm, or corporation for such repairs, including work done and materials furnished, and the said amount so claimed for such repairs shall also be stated in the notice posted before the court-house door as hereinbefore stated.

§ 3364(3). Sale at public outcry before court-house.—All sales made under the provisions of this Act shall be made at public outcry, before the court-house door of the county where the person, firm, or corporation making such sale had his place of business at the time of receiving the article or articles to be sold, and during the hours provided by law for holding sheriff's sales.

§ 3364(4). Application of proceeds.—The proceeds of any sale made under the provisions of this Act shall be applied first to the payment of the lien for services rendered by the person, firm, or corporation making such sale, for work done and materials furnished in repairing such article or articles sold, including the cost of the registered notice hereinbefore provided for, and the residue, if any, shall be paid to the ordinary of the county wherein such sale shall have taken place, who shall hold said sum for a period of one year, during which time the owner or owners of the article or articles so sold may claim said residue; but at the end of said period of one year, if said residue shall not have been claimed by the owner or owners of the article or articles, so sold, then and in that event said residue shall by the said ordinary be placed in the common-school fund of the county wherein said sale was made.

§ 3364(5). Display of sign as to intention to sell.—Any jeweler, person, firm, or corporation desiring to avail himself of the provisions of this Act shall display a sign in his place of business notifying the public that all articles left for repairs will be sold for charges at the expiration of one year from completion of such repairs.

ARTICLE 3

Foreclosure of Liens on Personal Property.

§ 3366. (§ 2816.) Enforcement of liens on personality.

What Counter-Affidavit Must Contain.—Only defensive matter to a foreclosure of a lien on personality being required in a counter-affidavit filed by the defendant under this section such an affidavit, when made by the defendant's agent, as provided in section 3607, need not contain a sworn averment that the affiant is agent for the defendant. It is sufficient if such affidavit is in fact made by the defendant's duly authorized agent, and where the affidavit purports on its face to be executed by such agent, the agency is presumed and the affidavit is prima facie valid. *Georgia Lumber Co. v. Thompson*, 34 Ga. App. 281, 129 S. E. 303.

Judgment.—Where, upon the foreclosure of a laborer's general lien as provided in sections 3366 et seq. of the Civil Code of 1910, the property seized is not replevied, no general judgment thereon can be rendered, even though a counter-affidavit disputing the correctness of the plaintiff's claim is filed by the defendant. Only a judgment establishing the lien upon the property seized can be legally rendered. *Downs v. Bedford*, 39 Ga. App. 155, 146 S. E. 514, query as to whether applicable to liens for labor under foreign contracts.

ARTICLE 4

Miscellaneous Provisions

§ 3374. (§ 2824.) Attorney's rights in claim cases.

Cited in Porter v. Stewart, 163 Ga. 655, 660, 137 S. E. 28.

CHAPTER 11

Homestead

ARTICLE 1

Exemptions

SECTION 4

Surveyor's Return; Approval of Plat and Application

§ 3386. (§ 2836.) Objections, how and when made.

Effect in Bankruptcy of Failure to Set Aside Exemption.—The fact that the bankrupts, as residents of Georgia, did not set apart exemptions in the manner provided by either Const. Ga. art. 9, sec. 1, or sections 3416, 3378, et seq., did not preclude the allowance of exemptions under such law in bankruptcy proceedings. *Clark v. Nirenbaum*, 8 Fed. (2d). 451.

The purpose of an objection to the schedule for want of sufficiency and fullness is to prevent the allowance of the homestead (section 3378 paragraph 3), and it does not fail as an objection under this section merely because it may be described as an "objection to the homestead." *Alday v. Spooner*, 35 Ga. App. 614, 617, 134 S. E. 343.

When Appeal Lies.—Where a creditor filed objections, one of which was to the schedule for want of sufficiency and

fullness in that the applicant had omitted certain personality, appeal to the superior court lies from an adverse judgment of the ordinary. *Alday v. Spooner*, 35 Ga. App. 614, 134 S. E. 343. See note of this case under § 3388.

§ 3388. (§ 2838.) Appraisers and appeals.

Objections Not Limited to Schedule.—This section does not provide exclusively for objections to the schedule. The creditor is not required to object to the schedule, if he desires to dispute "the propriety of the survey, or the value of the premises so platted as the homestead." *Alday v. Spooner*, 35 Ga. App. 614, 616, 134 S. E. 343.

SECTION 11

§ 3413. (§ 2863). Debtor may waive exemption.

Instrument Constituting Waiver.—If a customer who is indebted to a merchant on an open account makes a written financial statement to the merchant, which expresses a waiver of homestead exemption relative to his present indebtedness and to any future indebtedness that may be incurred on account of subsequent purchase of goods, but does not at the time agree to make purchases, and the merchant does not at the time bind himself to extend future credit, the homestead waiver expressed in the statement will not be contemporaneous with a subsequent contract of purchase resulting from a sale of goods wherein the merchant on faith of the waiver extends credit, and will not be a valid waiver as against the debt created by reason of the subsequently purchased goods. *Frank & Co. v. Weiner*, 167 Ga. 892, 147 S. E. 51.

ARTICLE 2

Statutory or Short Homestead

SECTION 1

Property Exempt from Sale

§ 3416. (§ 2866.) Property exempt from sale.

As to effect in bankruptcy of failure to set aside homestead exemption, see note to § 3378. See annotations under § 6582.

I. GENERAL NOTE.

Exemption as Homestead—Waiver after Setting Apart.—There is no true homestead in Georgia, but under this section there is a direct exemption of property without regard to residence or home, realty or personality, and though such exemption may be waived before setting apart (Const. Ga. art. 9, sections 3, 5), after setting apart of exempt property it cannot be aliened or incumbered by debtor. In *re Trammell*, 5 Fed. (2d), 326.

Increase of Exemption.—Debtor's right of exemption under Const. Ga. art. 9, section 1, and this section, affects debtor's whole property as an inchoate incumbrance created by law, and cannot be increased as to debts in existence without violating contract clause of Federal Constitution. In *re Trammell*, 5 Fed. (2d), 326.

Setting Aside in Bankruptcy Court.—"Setting apart" of debtor's exempt property is a mere identification of the property to which the exemption is applied, the burden of securing which is put on debtor and is a proper function of bankruptcy court, whose action is equivalent to action by the state court in effectuating exemption. In *re Trammell*, 5 Fed. (2d), 326.

Alienage as Affecting Right.—Alienage of resident of state is no bar to claim of exemption provided by this section. In *re Trammell*, 5 Fed. (2d), 326.

Same—Where Family Resident Out of State.—Alien resident of Georgia having no family within State, but having mother in Poland and sister in other state to whom he

regularly sends money, is not the head of a family entitled to exemption provided by this section. In *re Trammell*, 5 Fed. (2d), 326.

When Property Set Aside to Defeat Sale.—Setting apart of property exempt under this section, though necessary to defeat sale, is timely, when not had before levy, if made before sale. In *re Trammell*, 5 Fed. (2d), 326.

After Acquired Property.—Property not owned by a debtor, when filing his schedule of property exempted under this section but which is afterwards acquired by him, is not subject to exemption under the schedule, although described therein. *Smith v. Eckles*, 65 Ga. 326; *Fuller v. Doyal*, 34 Ga. App. 245, 129 S. E. 117.

II. PARAGRAPH 1.

Act of Ordinary Ministerial.—The act of the ordinary in receiving and recording the schedule of land to be set apart as a homestead under this section, is ministerial, and may be collaterally attacked in a case involving the title. *Kimsey v. Rogers*, 166 Ga. 176, 142 S. E. 667.

Proof of Value.—It not affirmatively appearing from the schedule that the house and land embraced therein exceeded in value \$500 when the schedule was filed, and it affirmatively appearing from the petition in this case that the same was about of the value of \$400, we can not say as a matter of law that the exemption of this property was void for the reason that the value of the house and land embraced in the schedule, and situated in a village, exceeded in value said amount at the time the schedule was filed. *Wood v. Wood*, 166 Ga. 519, 143 S. E. 770.

Demurrer.—Even if the homestead was void, so far as the house and land are concerned, for the reason that their value exceeded \$500 at the time the schedule was filed, this fact would not render the petition subject to general demurrer; the plaintiff, while alleging the existence of the homestead, not asserting any rights thereto under her petition in this case. *Wood v. Wood*, 166 Ga. 519, 520, 143 S. E. 770.

SECTION 2

How Set Apart

§ 3421. (§ 2871.) Sale subject to incumbrance.

Pending Application.—See *Rogers v. Kimsey*, 163 Ga. 146, 135 S. E. 497, citing and following the statement under this catchline in the Georgia Code of 1926.

CHAPTER 12

Interest and Usury

ARTICLE 1

General Principles

§ 3426. What is lawful interest.

Where bonds misappropriated by corporate officers actually bore 8 per cent., but the record did not show that any interest had been or would be paid thereon, and the recovery was for full par value whereas the bonds were sold for 85 cents on the dollar, the allowance of interest on the judgment at 7% in accordance with this section was proper. *Flint River Pecan Co. v. Fry* (Ga.), 29 Fed. (2d) 157, 159.

§ 3427. (§ 2877). What is usury.

Pretenses and Contrivances Prohibited.—It is the policy of the laws of this State to inhibit the taking of usury under every and any pretense of contrivance whatsoever. *McGehee v. Petree*, 165 Ga. 492, 141 S. E. 206, citing *Troutman v. Barnett*, 9 Ga. 30, 35.

Purchase of a Note.—The evidence required finding of usurious transaction in guise of the purchase of a note in *McGehee v. Petree*, 165 Ga. 492, 141 S. E. 206.

§ 3431. (§ 2881.) Interest only from demand, when.

Provision That Obligation Bear No Interest.—A stipulation in a contract for the sale of goods, to be delivered within a reasonable time in the future and to be paid for on delivery, to the effect that the obligation of the purchaser was to bear no interest, did not mean that the purchaser would not be required to pay interest in case of and after his default, but was merely a provision against the payment of interest prior to the maturity of the purchase-money. *Morgan v. Colt Co.*, 34 Ga. App. 630, 130 S. E. 600.

Becomes Part of Contract.—This section entered into and became one of the material terms of the paving contract, and, in the absence of an agreement to the contrary, interest does not run against any installment until default or at any time prior to maturity. *Cochran v. City of Thomasville*, 167 Ga. 579, 583, 146 S. E. 462.

§ 3432. (§ 2882.) Interest on judgments.

As all judgments bear interest from the date of rendition under this section, it is immaterial that the verdict found does not provide for future interest. The judgment therefore, in so far as it provides for future interest, is lawful, and is not invalid upon the ground that it does not follow the verdict. *Lang v. South Georgia Investment Co.*, 38 Ga. App. 430, 144 S. E. 149.

§ 3434. (§ 2884.) Interest on liquidated demands.

I. WHEN INTEREST ALLOWED.

When Recovery Exceeds Amount Stated in Bond.—The defendant may be liable, though the aggregate amount of the plaintiff's recovery, both for principal and interest, will exceed the maximum amount of the defendant's liability as stated in a bond. *United States Fidelity, etc., Co. v. Koehler*, 36 Ga. App. 396, 137 S. E. 85.

On Damages Recovered for Breach of Sale Contract.—Under this section interest is recoverable on damages recovered for breach of a contract of sale by the buyer from the time the amount of damages became fixed by a resale. *Bell v. Lamborn*, 2 Fed. (2d), 205.

II. LIQUIDATED DEMANDS.

A. Particular Instances of Liquidated Demands.

1. In General.

Breach of a Contract of Sale.—Where a purchaser breached a contract by a failure to pay the purchase-money on the delivery of the goods, the seller was entitled to recover the agreed purchase-price as liquidated damages, with interest thereon from the time the purchaser was liable and bound to pay. *Morgan v. Colt Co.*, 34 Ga. App. 630, 130 S. E. 600.

Liquidation Is a Certain and Fixed Amount.—A debt is liquidated when it is certain how much is due and when it is due. An unliquidated claim is one which one of the parties to the contract or transaction can not alone render certain. *Lincoln Lumber Co. v. Keeter*, 167 Ga. 231, 236, 145 S. E. 68, citing *Roberts v. Prior*, 20 Ga. 561.

§ 3436. (§ 2886.) Beyond eight per cent. interest forbidden.

What Constitutes Usury.—There are four requisites of every usurious transaction: (1) A loan or forbearance of money, either express or implied. (2) Upon an understanding that the principal shall or may be returned. (3) And that for such loan or forbearance a greater profit than is authorized by law shall be paid or is agreed to be paid. (4) That the contract was made with an intent to violate the law. The fourth element may be implied if all the others are expressed upon the face of the contract. *Bank v. Farmers State Bank*, 161 Ga. 801, 810, 132 S. E. 221.

Court Will Look at Substance of Transaction.—The ingenuity of man has not devised a contrivance by which usury can be legalized, if it appears that the purpose of the scheme was to exact a larger profit for the use of the money actually advanced than eight per cent. per annum. In determining whether the contract is usurious the substance of the transaction will be critically inspected and analyzed; for the name by which the transaction is denominated is altogether immaterial if it appears that a loan of money was the foundation and basis of the agreement which is under

consideration. *Bank v. Farmers State Bank*, 161 Ga. 801, 132 S. E. 221.

If an agreement is a mere device or subterfuge by which one party was permitted to charge a higher than the lawful rate of interest allowed in this State for a loan of money, the agreement would be usurious, and the company could collect no interest at all. *Stewart v. Miller & Company*, 161 Ga. 919, 925, 132 S. E. 535.

"Underwriting" Not within Section.—An "underwriting," is not an agreement to loan money and under the circumstances of the case this section does not apply. *Stewart v. Miller & Co.*, 161 Ga. 919, 132 S. E. 535.

Transaction with underwriter of bond issue, who received discount of 15 per cent from face value of bonds and other specific allowances, is not usurious, under this section, in view of necessity for resale of bonds. *G. L. Miller & Co. v. Claridge Manor Co.*, 14 Fed. (2d), 859.

Where a debtor who has been adjudicated a bankrupt, but who has not obtained a discharge, arranges with one of his creditors for a loan of money on condition that he will execute a note to cover the loan, with lawful interest and also the amount of his previous indebtedness to the creditor, the transaction is a valid and enforceable renewal of the antecedent debt, and the note is not usurious because it contains a promise to pay the same. *Cameron v. Meador-Pasley Company*, 39 Ga. App. 712, 148 S. E. 309.

Allowance of Expenses—Burden of Proof.—The party alleging that a transaction with an underwriter of a bond issue was usurious by reason of an allowance for expenses has the burden of proving that the amount was so extravagant as to show bad faith. *G. L. Miller & Co. v. Claridge Manor Co.*, 14 Fed. (2d), 859.

Charging Interest on Interest Due.—A contract to pay eight per cent. per annum semi-annually, with interest on the semi-annual payments of interest after due, does not constitute usury under this section. *Pendergrass v. New York Life Ins. Co.*, 163 Ga. 671, 137 S. E. 36.

Question for Jury.—The question as to whether one intends to exact usury by a contrivance or device or whether the alleged charge is bona fide for actual services is for the determination of the jury. *Bank v. Farmers State Bank*, 161 Ga. 801, 132 S. E. 221.

§ 3438. Park's Code.

See § 3438(1).

§ 3438 (1). All interest forfeited for usury.

Section 3444 and section 700 of the Penal Code were not repealed by this section. *Bennett v. Lowry*, 167 Ga. 347, 145 S. E. 505.

Where, as a condition precedent to the obtaining of a loan of money upon which the full legal rate of interest is charged, and without other consideration or inducement to him, the borrower is required by the lender to become surety for a third person upon a note to cover past and future interest upon a pre-existing debt due to the lender by such third person, and thus to extend the maturity of such old debt from a date in the past to a date in the future, the borrower's promise as contained in the note so executed as surety is in the nature of interest upon the loan to himself, and, being additional to the legal rate, is subject to be forfeited as usury. *Winder Nat. Bank v. Graham*, 38 Ga. App. 552, 144 S. E. 357.

Constitutionality.—See *Mitchell v. Loan & Investment Co.*, 161 Ga. 215, 130 S. E. 565, approving the statement under this catchline in the Georgia Code of 1926.

Forfeiture of Interest Is Sole Forfeit.—Under the laws of Georgia the exaction of a higher rate of interest for the use of money than eight per centum per annum is unlawful, and prevents the collection of any interest whatever. *Bank v. Farmers State Bank*, 161 Ga. 801, 132 S. E. 221; but no other forfeit shall be occasioned. *Stewart v. Miller & Co.*, 161 Ga. 919, 132 S. E. 535; *Padgett v. Jones*, 34 Ga. App. 244, 129 S. E. 109.

Thus an assignment of salary to secure a usurious debt would be valid as to the principal. *Flood v. Empire Investment Co.*, 35 Ga. App. 266, 271, 133 S. E. 50.

§ 3444. Rate greater than five per cent per month punished.

Not Repealed by Section 3438(1).—This section and section 700 of the Penal Code were not repealed by section 3438(1). *Bennett v. Lowry*, 167 Ga. 347, 145 S. E. 505.

ARTICLE 2

Business of Loans on Personal Property

§ 3446. License required.

See note to § 1770(61).

Purpose of Article.—As the only provision in this article for raising revenue is that contained in § 3447 it is manifest that its purpose is not the raising of revenue, but is the protection of those who are compelled to borrow from improper lenders who have failed to comply with the statutes for such protection. *McLamb v. Phillips*, 34 Ga. App. 210, 129 S. E. 570.

Effect of Noncompliance on Contract.—Therefore a contract made without a compliance with and in violation of the statute is void and unenforceable. *McLamb v. Phillips*, 34 Ga. App. 210, 129 S. E. 570.

Not Applicable to Isolated Purchases.—The general tenor of this and the following section is to require such licenses of persons engaged in the business, and not of a person not engaged in the business and who makes an isolated purchase of wages or salaries. *Spurlock v. Garner*, 38 Ga. App. 614, 144 S. E. 819.

§ 3453. Sale or assignment of wages.

This section is not to be construed as requiring a person who is not "generally" engaged "in the business of buying wages or salaries," but who has made a single isolated purchase of salary by taking a salary assignment, to obtain a license as required by the act. This section is to be construed as bringing within the requirements of the act a sale and assignment of wages when made for the purpose of securing a debt, whether in existence or whether created at the time of the sale or assignment, in addition to an absolute sale of wages or salaries. *Spurlock v. Garner*, 38 Ga. App. 614, 144 S. E. 819.

CHAPTER 13

Of Bailments

ARTICLE 1

General Principles

§ 3471. (§ 2898). Ordinary.

Applied in *Southern Railway Co. v. Rundle*, 37 Ga. App. 272, 274, 139 S. E. 830.

§ 3472. (§ 2899). Extraordinary.

Scope of Section.—See *Peavy v. Peavy*, 36 Ga. App. 202, 204, 136 S. E. 96, citing and following the statement under this catchline in the Georgia Code of 1926.

§ 3473. (§ 2900.) Gross neglect.

When Violation of Speed Law Not Gross Negligence.—Conceding, but not deciding, that the State law, prohibiting the driving of automobiles at a greater rate of speed than ten miles an hour while approaching and traversing intersections of public highways, applies to intersections of streets in a city, the violation of this law would not constitute gross negligence. *Southern Ry. Co. v. Davis*, 132 Ga. 812, 817, 65 S. E. 131; *Peavy v. Peavy*, 36 Ga. App. 202, 204, 136 S. E. 96.

§ 3474. (§ 2901.) Due care in child.

No Invariable Rule.—The care and diligence required of an infant of tender years is not fixed by any invariable rule with reference to the age of the infant or otherwise. It depends upon the capacity of the particular infant, taking into consideration his age as well as other matters. *McLarty v. Southern Ry. Co.* 127 Ga. 161, 56 S. E. 297; *Mac-*

Dougald Construction Co. v. Mewborn, 34 Ga. App. 333, 337, 129 S. E. 917.

Infants under Fourteen.—Infants under fourteen years of age are chargeable with contributory negligence resulting from a want of such care as their mental and physical capacity fits them for exercising, and assume the risk of those patent, obvious and known dangers which they are able to appreciate and avoid. *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674; *MacDougald Construction Co. v. Mewborn*, 34 Ga. App. 333, 337, 129 S. E. 917.

Question of Capacity for Jury.—See *Western & Atlantic R. R. v. Reed*, 35 Ga. App. 538, 134 S. E. 134.

Applied in *McCombs v. Southern Railway Co.*, 39 Ga. App. 716, 720, 148 S. E. 407.

§ 3475. (§ 2902.) Imputable negligence.

Negligence of Husband Not Imputed to Wife.—Where a husband, not acting as agent of his wife, operates an automobile not belonging to the wife, but under her command, his negligence is not imputable to the wife. *Holloway v. Mayor*, 35 Ga. App. 87, 132 S. E. 106.

Instructions to Jury.—For a case where it was not error to instruct the jury, as a matter of law, that the negligence of the driver of the vehicle was not imputable to the person for whose homicide the action was brought. See *Western & Atlantic Railroad v. Reed*, 35 Ga. App. 538, 134 S. E. 134.

ARTICLE 3

Of Deposits

§ 3508. (§ 2935). Liability of innkeeper for stolen goods.

See notes to § 2731.

ARTICLE 5

Pledges and Pawns

§ 3528. (§ 2956). What is a pawn.

Cited in *Maryland Cas. Co. v. Washington etc., Co.*, 167 Ga. 354, 360, 145 S. E. 761.

§ 3533. (§ 2961.) Transfer.

Transferee Stands in Transferor's Shoes.—The transferee of a pledge is a purchaser of the thing pledged. *Continental Trust Co. v. Bank*, 162 Ga. 758, 761, 134 S. E. 775.

CHAPTER 14

Of Principal and Surety

ARTICLE 1

The Contract

§ 3540. (§ 2968.) Stricti juris.

Section cited in *Southern Surety Co. v. Williams*, 36 Ga. App. 692, 137 S. E. 861.

§ 3541. (§ 2969.) Form immaterial.

Cited in *Mulling v. Bank*, 35 Ga. App. 55, 135 S. E. 222; *Federal Reserve Bank v. Lane*, 35 Ga. App. 177, 132 S. E. 247. **Cited** also in *Durden v. Youmans*, 37 Ga. App. 182, 139 S. E. 91.

ARTICLE 2

Relative Rights of Creditor and Surety.

§ 3543. (§ 2971). A change of contract.

Applied in *Payne v. Fourth Nat. Bank*, 38 Ga. App. 41, 142 S. E. 310.

§ 3544. (§ 2972.) Of risk.

See notes to § 4294(120).

I. IN GENERAL.

Effect of New Promise Made In Ignorance of Discharge.

—A new promise to pay the obligation, made by a surety in ignorance of the fact that he has been released and discharged, is not binding. *Crandall v. Shepard*, 166 Ga. 889, 144 S. E. 772.

Applied in *Short v. Jordan*, 39 Ga. App. 45, 146 S. E. 31.

II. ACTS OF CREDITOR IN GENERAL.

Splitting Debt.—Where a debtor to secure a debt deposits more than one piece of property, whether personal or real, as security in gross for an entire debt, the amount of which is definitely fixed in the contract, it is not within the power of the holder of such collateral, whether he be the original creditor or a transferee, to split the debt so as to make it the liability of two persons instead of one, and to be paid in full as to a portion of the original amount, with a provision that it shall still retain vigor as to the other debtor. *Loftis v. Clay*, 164 Ga. 845, 850, 139 S. E. 668.

§ 3545. (§ 2973). Tender by surety.

The burden is upon the surety to prove that the tender and demand were made either to the superintendent of banks or to one duly authorized by him, as provided in the act, to make collections for the bank. *Simmons v. Bennett*, 39 Ga. App. 272, 146 S. E. 799.

§ 3546. (§ 2974). Notice to sue.

A notice which states that the principal's residence is "Waycross, Ga.," but which does not state the county of the principal's residence, is not the notice required by this section. *Seckinger v. Exchange Bank*, 38 Ga. App. 667, 145 S. E. 94.

The provision in this section requires actual notice. Constructive notice, if there be any, arising by virtue of an act of the legislature incorporating a city, that the city is in a particular county, will not suffice as a compliance with this section. *Seckinger v. Exchange Bank*, 38 Ga. App. 667, 145 S. E. 94.

This section of the Civil Code is applicable to a case where the contract sued on in Georgia was executed in another State. *Watkins Co. v. Seawright*, 168 Ga. 750, 149 S. E. 45.

§ 3550. (§ 2978). Judgment against surety.

Former Law.—Prior to the act of 1893, now embraced in this section, it was necessary to bring an independent suit on all bonds given in an equitable proceeding; and since the passage of said act, judgment can be entered up against the principal and his sureties at the same time in an equitable proceeding only in a case where a bond has been made by the losing party, conditioned to pay the eventual condemnation-money in the action. *United States Fidelity, etc., Co. v. Tucker*, 165 Ga. 283, 286, 140 S. E. 866, citing *Jordan v. Callaway*, 138 Ga. 209, 75 S. E. 101.

Bond of indemnity, not for condemnation-money; no judgment entry as in case of appeal. *U. S. Fidelity, etc., Co. v. Tucker*, 165 Ga. 283, 286, 140 S. E. 866; Cf. *American, etc., Ins. Co. v. McGlothlin*, 165 Ga. 173, 140 S. E. 354.

ARTICLE 3

Rights of Surety against Principal

§ 3552. (§ 2980). For money paid.

Payment by a surety or indorser of a debt past due en-

titles him to proceed immediately against his principal for the sum paid, with interest thereon, and all legal costs to which he may have been subjected by default of his principal. Under the facts of this case the plaintiff was a surety or indorser and not a guarantor, and is to be subrogated to the rights of the payee in the notes in controversy to the extent of his payment. *Electric City Brick Co. v. Hagler*, 168 Ga. 836, 149 S. E. 126.

§ 3553. (§ 2981). Effect of judgment against surety.

Cited in *Hunter v. Burson*, 168 Ga. 59, 147 S. E. 53.

§ 3556. (§ 2984.) Proof of suretyship.

Apparent Joint Principals.—See *Nunnally v. Colt Co.*, 34 Ga. App. 247, 129 S. E. 119, following the principle stated in the first paragraph under this catchline in the Georgia Code of 1926.

Same—Married Women.—Where a married woman signs a note ostensibly as a maker jointly with her husband, when in fact she is a surety only, before she can establish the fact of her suretyship as against the payee of the note it must be made to appear, despite her apparent relationship as principal, that the payee, with knowledge of the facts which would constitute her a surety, contracted with her as a surety. *Bennett v. Danforth*, 36 Ga. App. 466, 137 S. E. 285.

§ 3559. (§ 2987). When sued separately.

Cited in *Hunter v. Burson*, 168 Ga. 59, 147 S. E. 53.

ARTICLE 4

Rights of Sureties Among Themselves

§ 3564. (§ 2992). Right of contribution.

Two or more sureties who have paid the debt of their insolvent principal may jointly sue a cosurety for contribution, even where their action is based upon their right to contribution predicated upon the implied promise springing from the payment of the debt alone, and is not based upon notes paid off and transferred to them, where the plaintiff sureties jointly paid the debt, although it was paid by their individual funds. *Durden v. Youmans*, 37 Ga. App. 182, 139 S. E. 91.

ARTICLE 5

Rights of Sureties as to Third Persons

§ 3567. (§ 2995.) Subrogation.

In referring to sections 3567 and 3568 of said code, the Supreme Court, in *Train v. Emerson*, 141 Ga. 95, 97, 80 S. E. 554, said: "Whether the code sections serve to convert the right of substitution from an equitable to a legal right becomes quite immaterial since the enactment of our uniform procedure act, which permits the enforcement of equitable and legal rights in the same action in a court having jurisdiction to administer both." *Durden v. Youmans*, 37 Ga. App. 182, 139 S. E. 91.

Applied in *McWhorter v. Bank*, 162 Ga. 627, 134 S. E. 606. Section Cited in *Reid v. Whisenant*, 161 Ga. 503, 131 S. E. 904.

CHAPTER 15

Of Principal and Agent

ARTICLE 1

Relations of Principal and Agent Among Themselves

§ 3571. (§ 2999.) What may be done by agent.

Delegation of Power by Agent in General.—For a case holding substantially with the doctrine laid down in the case in paragraph three under this catchline in the Georgia Code of 1926, see *Mathis v. Western, etc., Railroad*, 35 Ga. App. 672, 680, 134 S. E. 793.

No agent may delegate his authority unless he is specially empowered to do so, and, for reasons that are entirely obvious, this rule is usually given a very strict, if not a literal application in case of public officers. *Deariso v. Mobley*, 38 Ga. App. 313, 322, 143 S. E. 915.

§ 3574. (§ 3002.) Agency created; how, agents of corporations.

Applies to Creation of All Agencies.—There is nothing in this section which confines it to agencies created for the execution of instruments under seal. It lays down a broad and sweeping rule for the creation of all agencies. *Byrd v. Piha*, 165 Ga. 397, 400, 141 S. E. 48.

Leases Executed by Agents.—Contracts creating the relation of landlord and tenant, for any time exceeding one year, must be in writing; and when executed by an agent, the authority of the agent to execute it must likewise be in writing. *Byrd v. Piha*, 165 Ga. 397, 141 S. E. 48.

§ 3575. (§ 3003.) Revocation.

Unreasonable Instructions—Bona Fide Disregard.—Where an agency is coupled with an interest, and the principal gives to the agent unreasonable instructions detrimental to the agent's interest, the agent may disregard the instructions and act for himself, provided he acts in good faith; and the principal would be bound thereby. *Southern Trading Corp. v. Benchley Bros.*, 34 Ga. App. 625, 130 S. E. 691.

§ 3576. (§ 3004.) Agent limited by his authority.

An agency to sell does not necessarily carry with it authority to collect. The agent must act within the authority granted him, and persons dealing with any agent appointed for a particular purpose are bound to inquire as to the extent of his authority. *Miles v. Smith*, 37 Ga. App. 619, 141 S. E. 314.

Section Applied in *Benton v. Roberts*, 35 Ga. App. 749, 134 S. E. 846.

§ 3577. (§ 3005.) Money deposited by agent.

Section Quoted in *Oslin v. State*, 161 Ga. 967, 132 S. E. 542.

§ 3578. (§ 3006.) Payment to agent failing to produce obligation.

Section Quoted in *Oslin v. State*, 161 Ga. 967, 132 S. E. 542.
Applied in *Osborn v. War Finance Corporation*, 39 Ga. App. 42, 145 S. E. 917.

§ 3579. (§ 3007.) Agents and fiduciaries to keep accounts.

When a receiver is called upon for an accounting, the burden is upon him to support his claim for expenditures by proper vouchers, or to show some sufficient reason why he can not do so. *Dodge v. Hatchett*, 118 Ga. 883, 45 S. E. 667; *Merritt v. George*, 168 Ga. 497, 500, 148 S. E. 334.

Section Quoted in *Oslin v. State*, 161 Ga. 967, 132 S. E. 542.

§ 3581. (§ 3009.) Diligence of an agent.

See note to P. C. 211(28).

Section Cited in *Benton v. Roberts*, 35 Ga. App. 749, 134 S. E. 846.

§ 3584. (§ 3012.) Estoppel.

Sub-Agent May Deny Title in Employing Agent and in Corporation.—In *Paschal v. Godley*, 34 Ga. App. 321, 322, 129 S. E. 565, it was said: "While an agent can not dispute his principal's title except in certain instances not present in this case, yet if *** in possession of the cattle merely by virtue of an employment by * * * an officer of the corporation, *** he would not because of these facts be estopped from defending upon the ground that the title was *** in the company."

§ 3587. (§ 3015.) Brokers right to commission.

I. IN GENERAL

Applied in *Latimer v. Gifford*, 37 Ga. App. 1, 138 S. E. 859.

II. COMPENSATION.

A. In General.

Limitations Must Be Embodied in Contract.—If the owner of the property desires to limit his liability for commissions in a manner other than that which is governed by the general rule, such as that commissions will be due only in the event of a consummated sale, provision for such limitation of liability must be embodied in the authority to sell. *Hall v. Vandiver*, 37 Ga. App. 656, 141 S. E. 332.

B. Sale by Principal.

As to sale by principal, see *City National Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S. E. 795.

Before Broker Procures Purchasers—Exclusive Authority and Exclusive Right.—A distinction has been raised between an exclusive agency to sell and an exclusive right to sell. Several cases in which there was merely an exclusive agency have called attention to the fact that an exclusive right was not conferred, without stating what the effect of conferring such right would be, and when that question has come squarely before the courts they have held that conferring the exclusive right to sell excluded sales by the owners themselves. 10 A. L. R. 818. See dissenting opinion of Luke, J., in *Barrington v. Dunwody*, 35 Ga. App. 517, 520, 134 S. E. 130.

Same—Same—Result as to Owners Right to Sell.—"Obviously if the broker is given an exclusive right to sell, it precludes his employer from selling in any manner other than through that particular broker's agency. The grant of merely an exclusive agency, however, does not have the effect of preventing the owner from selling independently through his own personal efforts, as it simply secures to the broker an exclusive 'agency,' that is, the employer can not sell through the medium of another broker without violating the terms of his agreement and rendering himself liable therefor." 4 R. C. L. 260, section 12. Quoted in the dissenting opinion of Luke, J., in *Barrington v. Dunwody*, 35 Ga. App. 517, 520, 134 S. E. 130.

D. Modification of Effects of Section by Contract—Sales Agents—Necessity for Consummation of Sale.

Modification by Agreement.—An owner may stipulate in the contract of listment that he is not to be subject to the payment of brokerage commissions until the actual acceptance of title by the officer. *Kiser Real Estate Co. v. Shippen Hardwood Lumber Co.*, 34 Ga. App. 308, 129 S. E. 294.

§ 3591. (§ 3019.) Effect of ratification.

Ratification of an agent's act is presumed from slight circumstances and is as effective as if the act was originally authorized, and is not revocable. *Napier v. Pool*, 39 Ga. App. 196, 146 S. E. 783.

ARTICLE 2

Rights and Liabilities of Principal as to Third Persons

§ 3595. (§ 3023.) Extent of authority.

III. SPECIAL AGENTS.

Duty to Investigate Authority.—For a case which adheres to the rule laid down in the first paragraph under this catchline in Georgia Code of 1926, see *Quillion & Bros. v. Wales Adding Machine Co.*, 34 Ga. App. 135, 136, 128 S. E. 698.

How Far Principal Bound.—One who deals with a special agent, knowing at the time the limits within which the agent, under the terms of his appointment, has authority to bind his principal, is bound to act with reference to this knowledge, and can not hold the principal liable for loss occasioned by acts of the agent in excess of, or contrary to, the latter's authority in the premises. See *Littleton v. Loan etc., Asso.*, 97 Ga. 172, 25 S. E. 826; *Quillan & Bros. v. Wales Adding Machine Co.*, 34 Ga. App. 135, 136, 128 S. E. 698.

Authority to Collect.—In *Quillan & Bros. v. Wales Adding Machine Co.*, 34 Ga. App. 135, 137, 128 S. E. 698, is quoted the following statement taken from an opinion delivered by

Mr. Justice Lewis, in *Walton Guano Co. v. McCall*, 111 Ga. 114, 116, 36 S. E. 469: "As a general rule a special agent or attorney to collect a debt is not authorized to receive anything as a payment thereon except actual cash." In the same case it was added that an agency does not necessarily include an agency to collect.

Cited in *Armour Fertilizer Works v. Maddox*, 168 Ga. 429, 148 S. E. 152; *Miles v. Foy*, 38 Ga. App. 473, 474, 144 S. E. 802; *Johnson v. Milam*, 38 Ga. App. 568, 144 S. E. 346.

§ 3596. (§ 3024). Failing to disclose principal.

Illustrative Case.—Where certain individuals composing a committee to represent the general citizenry, whose names and identities were not disclosed, purchased a monument to be erected as a memorial to the soldiers from a given county who died in the World War, and the contract of purchase and sale was duly executed by the seller in terms of the agreement, the members of the committee may be held liable as individuals in a suit by the seller on account for the price of the monument. *Schneider Marble Co. v. Knight*, 37 Ga. App. 646, 141 S. E. 420.

Cited in *Miles v. Foy*, 38 Ga. App. 473, 476, 144 S. E. 802.

§ 3606. (§ 3034.) Agent is a competent witness.

I. IN GENERAL.

Cited in *George v. Rathstein*, 35 Ga. App. 126, 132 S. E. 414.

II. DECLARATIONS OF AGENT

A. Generally

Agent Must Be Acting for Principal.—Under this section and section 5779 "declarations of an agent as to business transacted by him, in order to be admissible against his principal, must have been made by him while representing the principal in the transaction in controversy, and must also have been a part of the negotiation, and constituting the *res gestae*." *National Building Assn. v. Quin*, 120 Ga. 358(2), 47 S. E. 962. "Admissions of the alleged agent of a corporation are not admissible to bind the corporation unless the agency be shown." *Ninth District Agricultural & Mechanical School v. Wofford Power Co.*, 37 Ga. App. 271, 139 S. E. 916.

Where, although it appeared that the person whose admissions were introduced was the agent of the defendant "from 1917 to 1924," there was nothing to show when such admissions were made, or that they were made during the existence of the agency and within the scope of the agent's authority, a verdict in the plaintiff's favor was without evidence to support it as to such items. *Ninth District Agricultural & Mechanical School v. Wofford Power Co.*, 37 Ga. App. 271, 139 S. E. 916.

ARTICLE 3

Rights and Liabilities of Agent as to Third Persons

§ 3607. (§ 3035.) Agent may act under this Code, for principal.

See notes to § 3366 par. 6.

§ 3611. (§ 3039). When responsible for credit given.

Illustration.—A person who has obtained a diversion of a shipment of goods during transportation by a carrier is not liable for a resulting additional freight charge, where, in ordering the diversion, he was acting as agent for another, and the carrier must have known of this fact. *B. & O. R. Co. v. Johnson-Battle Lumber Co.*, 37 Ga. App. 729, 141 S. E. 678.

But where a person would relieve himself from personal liability on the ground of such agency, he ordinarily has the burden of proving the fact of agency as well as knowledge thereof by the opposite party. *Citizens Nat. Bank v. Jennings*, 35 Ga. App. 553, 134 S. E. 114; 2 C. J. 923; *B. & O. R. Co. v. Johnson-Battle Lumber Co.*, 37 Ga. App. 729, 141 S. E. 678.

§ 3613. (§ 3041). Liability for excess of authority.

See notes to § 4413.

FIFTH TITLE

Of Property and the Tenure by Which it is Held

CHAPTER 1

Of Realty

§ 3619. (§ 3047). Lateral support.

Acquisition by Prescription.—The extent of an easement to use a wall of an adjoining owner for the support of a building, which is acquired by prescription, is the enjoyment of the use of the wall for the support of the house as it existed during the period of prescription. *Levinson v. Goode*, 164 Ga. 361, 138 S. E. 583.

The owner of a wall which is subject to an easement by prescription for the support of the building of an adjoining owner has the right, on raising the wall higher, to the sole use thereof unaffected by any easement for the use of the new portion to support an additional story of the house to which the easement belongs. *Levinson v. Goode*, 164 Ga. 361, 138 S. E. 583.

§ 3620. (§ 3048). Excavations by adjoining owners.

If irreparable injury to the property of the adjacent proprietor will probably result from failure by the excavator to exercise ordinary care and reasonable precaution to sustain the land with the buildings thereon, equity will afford relief by injunction. *Massell Realty Improvement Co. v. MacMillan Co.*, 168 Ga. 164, 147 S. E. 38.

Under proper construction of this and the preceding section where a proprietor desires to make a necessary excavation up to the line of a lot for the purpose of constructing a building, and the adjacent proprietor has an existing building the wall of which extends along the property line, so that the work of excavating will withdraw lateral support of the wall and tend to render it unsafe, it is the duty of the party desiring to make the excavation to give the adjoining proprietor reasonable notice of his intention to make the excavation, and also to exercise ordinary care and take reasonable precautions to sustain the land of the other, so as to avoid injury to the land including the building thereon. *Massell Realty Improvement Co. v. MacMillan Co.*, 168 Ga. 164, 147 S. E. 38.

§ 3621. (§ 3049). Fixtures.

Particular Fixtures Considered and Principles Illustrated—Machinery.—Boilers, smokestacks, etc., installed in creamery plant, removal of which would incapacitate plant, is, under this section, fixtures included within a prior mortgage of after-acquired property, which became superior to vendor's reservation of title. *In re Moultrie Creamery & Produce Co.*, 2 Fed. (2d), 129.

However heavy mill machinery not attached to the building, but held in place by its own weight, does not pass under a mortgage of the realty and appurtenances, which did not mention the machinery. *Anglo-American Mill Co. v. Dingler*, 8 Fed. (2d), 493.

§ 3630. (§ 3058.) Streams boundary lines.

Constitutionality.—The provisions in this section as to change of currents and gradual accretions are not unconstitutional as a violation of the due-process clause of the State and Federal Constitutions. *Johnson v. Hume*, 163 Ga. 867, 137 S. E. 56.

§ 3633. (§ 3061). Power of owner of streams.

See notes to § 4475.

§ 3639. (§ 3063). Bridge or ferry right.

Loss of profits in operating public ferry, resulting from condemnation of land for bridge on public highway, not recoverable. *State Highway Board v. Willcox*, 168 Ga. 886, 149 S. E. 182.

Cited in *Woodruff v. Bowers*, 165 Ga. 408, 140 S. E. 844.

§ 3645. (§ 3069). Parol license, when not revocable.

Cited in *Garrard v. Milledgeville Banking Co.*, 168 Ga. 339, 342, 147 S. E. 766.

CHAPTER 2

Of Personalty

§ 3651(1). Crops; liens, how attested and recorded; levies on unmaturing crops.

Effect of Sale of Land with Growing Crops.—Since the passage of this section the purchaser of lands upon which crops are growing, at a sale by the trustee in bankruptcy of the owner of the land, does not acquire any interest in or title to such crops. Such purchaser under such sale only acquires title to the land so purchased, and the right to the rents, issues, and profits thereof after the date of his purchase. *Chatham Chemical Co. v. Vidalia Chemical Co.*, 163 Ga. 276, 136 S. E. 62.

Effect of Land Mortgage upon Crop Mortgage.—Want of valid title in the mortgagor to the premises on which mortgaged crops are grown, and outstanding title in a third person who is no party to the suit, does not bar an action brought by the mortgagee to foreclose and enforce his mortgage on such crops. *Chatham Chemical Co. v. Vidalia Chemical Co.*, 163 Ga. 276, 136 S. E. 62.

Title to Crops on Land Encumbered before but Sold after Section.—Notwithstanding this section, the purchaser of lands under a power of sale in a security deed of older date than the section acquired title to crops grown after the passage of this section at the time of the sale if they were grown and owned by the grantor in such deed; but if the grantor had in fact, prior to such sale, rented in good faith these lands to others, who raised such crops, such purchaser did not acquire title to them, but only the interest of the grantor in such deed in these crops. *Chason v. O'Neal*, 158 Ga. 725, 124 S. E. 519; *Brooks v. Causey*, 36 Ga. App. 233, 136 S. E. 282.

§ 3652. (§ 3076.) Rights and remedies.

There Can Be No Right of Action until There Has Been a Wrong.—See *Strachan Shipping Co. v. Hazlip-Hood Co.*, 161 Ga. 480, 131 S. E. 283, which quotes with approval the doctrine of the cases under this catchline in Georgia Code of 1924.

Where one sustains an injury to his person and also damage to his property from the same act or acts of negligence of another, two distinct causes of action arise in favor of the person so aggrieved, and a recovery for the damage to his property is not a bar to a subsequent action for the injury to his person. *Endsley v. Ga. Railway & Power Co.*, 37 Ga. App. 439, 140 S. E. 386.

§ 3653 (§ 3077.) Assignment of choses in action.**II. DEFINITION AND GENERAL CONSIDERATION.**

Cited in *Garrard v. Milledgeville Banking Co.*, 168 Ga. 339, 342, 147 S. E. 766.

III. WHAT IS ASSIGNABLE.**B. Under This Section.****2. Particular Choses Considered.**

Funds in Potential Existence.—It is not necessary that the fund attempted to be assigned shall be in actual existence at the time, for it is well settled that it is sufficient if it "exists potentially." *Brown Guano Co. v. Bridges*, 34 Ga. App. 652, 656, 130 S. E. 695.

IV. REQUISITES AND VALIDITY.**A. In General.**

For this purpose of assignment under this section no

special form is necessary, but the assignment will be sufficient if its language discloses the intention of the owner to transfer his rights to the assignee. Hence, an indorsement on a non-negotiable promissory note, "Pay to acct. Isabella L. Calhoun, Trustee," signed by the payee therein, was, when accompanied by delivery, sufficient to authorize such transferee to bring suit thereon against the maker. *Peck v. Calhoun*, 39 Ga. App. 764, 145 S. E. 528.

VI. EQUITABLE ASSIGNMENT.

Immediate Change of Ownership.—In order to infer an equitable assignment, such facts and circumstances must appear, as would not only raise an equity between the assignor and the assignee, but show that the parties contemplated an immediate change of ownership with respect to the particular fund in question, not a change of ownership when the fund should be collected or realized, but at the time of the transaction relied upon to constitute the assignment. *Brown Guano Co. v. Bridges*, 34 Ga. App. 632, 656, 130 S. E. 695.

§ 3654. (§ 3078). Assignment of fund.

The effect of this section is not to render illegal all equitable assignments resting in parol. This section was codified from the decision in *Baer v. English*, 84 Ga. 403, (11 S. E. 453, 20 Am. St. R. 372), which dealt with the question whether an ordinary bill of exchange, until accepted, operated as an assignment. In that case Judge Bleckley said: "There may be cases (see *Daniel v. Tarver*, 70 Ga. 203) in which the doctrine of equitable assignment would still have application, notwithstanding the Code furnishes the means by which to accomplish a legal assignment without any aid from equitable principles." *Beasley v. Anderson*, 167 Ga. 470, 146 S. E. 22.

§ 3655. (§ 3079). What not assignable.

The right of action in the assignee of a salary assignment, to recover against the assignor for damage resulting from the assignor's collecting the assigned salary and appropriating it to his own use, does not arise out of fraud on the assignee, but involves a right of property. The right of action is assignable, under this section as interpreted in *Sullivan v. Curling*, 149 Ga. 96, 99 S. E. 533; *Information Buying Company v. Morgan*, 39 Ga. App. 292, 147 S. E. 128.

§§ 3655(a)-3655(c). Park's Code.

See § 3651(1).

SIXTH TITLE

Estates and Rights Attached Thereto

CHAPTER 1

Of Absolute Estates or in Fee Simple

§ 3659. (§ 3083.) What words create.

Intention of Maker Cardinal Rule of Construction.—For cases holding substantially with cases cited under this catchline in the Georgia Code of 1926, see *Banks v. Morgan*, 163 Ga. 468, 136 S. E. 434, and cases there cited.

Words of Inheritance.—Pursuant to this section it is held that, as a reservation is a grant by implication of a thing reserved, words of inheritance are no longer necessary to convey an estate in fee simple to the grantor. In the case of an exception, words of inheritance are necessary. *Grant v. Haymes*, 164 Ga. 371, 379, 138 S. E. 892.

Applied in *Hollomon v. Board of Education*, 168 Ga. 359, 364, 147 S. E. 882.

§ 3660. (§ 3084). Technical words.

"Heirs of the Body."—Under this section and the case of *Starnes v. Sanders*, 151 Ga. 632 (108 S. E. 37), the words "heirs of the body" mean children, and not grandchildren. *Baynes v. Aiken*, 166 Ga. 898, 899, 144 S. E. 736.

CHAPTER 2

Of Estates for Life

§ 3667. (§ 3091). Increase.

Where a testator devised and bequeathed to one for life "the use, income, and profits" of certain real and personal property, with remainder over to others, with power in the executors to sell and reinvest in "income-producing property or securities," subject to the same uses, and the property devised was sold and reinvested in property which enhanced in value, such enhancement in value became a part of the corpus of the estate and inured to the benefit of the remaindermen, and could not be collected by and for the use of the life-tenant. *Wood v. Davis*, 168 Ga. 504, 148 S. E. 330.

CHAPTER 3

Of Estates in Remainder and Reversion

§ 3675. (§ 3099). No particular estate necessary.

"Ordinarily the election of the widow to take against the will has the effect of accelerating any remainders limited to take effect after a life-estate given to her." 28 R. C. L. 333. See *Toombs v. Spratlin*, 127 Ga. 766, 57 S. E. 59, where the doctrine is distinctly recognized. *Bank v. Futch*, 164 Ga. 181, 184, 138 S. E. 60.

§ 3676. (§ 3100.) Vested or contingent.

What Uncertainties Make Contingency.—There is a distinction between the uncertainty which makes a remainder contingent and the uncertainty of the estate ever taking effect in possession, which is incidental to even a vested remainder. In a vested remainder the time of possession and the enjoyment being deferred, there is always an uncertainty as to whether the estate will ever be enjoyed in possession. *Walters v. Walters*, 163 Ga. 884, 890, 137 S. E. 386. See also, 23 R. C. L. 500, sec. 33.

Same—Vested Subject to Be Divested.—Where remainders are subject to be divested, in whole or in part, by the disposition of the whole or some part of the property left by the testator, this contingency does not deprive the remainder of its character as vested. *Walters v. Walters*, 163 Ga. 884, 890, 137 S. E. 386. See also *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690.

Illustrations of Vested Remainders.—For a case holding substantially with *McDonald v. Taylor*, 107 Ga. 43, 32 S. E. 879, cited under this catchline in Georgia Code of 1926, see *Walters v. Walters*, 163 Ga. 884, 890, 137 S. E. 386.

Applied in *McCoy v. Olive*, 168 Ga. 492, 496, 148 S. E. 327.

§ 3678. (§ 3102.) Perpetuities.

Cases Not within Rule.—Clearly the limitation of an estate to plaintiff for life, and at her death to her children born and to be born, does not create a perpetuity. *Palmer v. Neely*, 162 Ga. 767, 135 S. E. 90.

§ 3680. (§ 3104). Vesting of remainders favored.

Contrary Intention Not Evidenced by Will.—A devise of realty for life, with remainder to testator's "lawful heirs," vests the remainder in those answering such description at the time of testator's death, unless the will evidences a manifest intention to the contrary, though the life-tenant is one of the class who will take the remainder. In the present case the will does not evidence any manifest intention contrary to the general rule. *Payne v. Brown*, 164 Ga. 171, 137 S. E. 921.

Applied in construing devises of personalty and realty in *Schoen v. Israel*, 168 Ga. 779, 149 S. E. 124.

§ 3681. (§ 3105.) Assent of the executor.

General Rule.—The first sentence of this section merely

states the general rule. *David v. David*, 162 Ga. 528, 134 S. E. 301.

§ 3682. (§ 3105). Merger.

Purpose of Doctrine.—The doctrine of merger of estates is designed primarily for the benefit of one who acquires an interest in property greater than he possessed in the first instance, and will not be held to apply, against his will, to his disadvantage. *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 204, 140 S. E. 507.

Necessity of Being in Same Person.—One estate can not be merged in another, unless both estates are owned by the same person in the same right. *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 140 S. E. 507.

No merger can take place until such identity of person and of present interest in point of facts exists. Whenever a greater and a lesser estate meet in one and the same person, without any intermediate estate, the lesser is sunk in the greater. *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 204, 140 S. E. 507.

Estates Must Be Coextensive and Commensurate.—In order for legal and equitable estate to merge, the estates must be coextensive and commensurate. *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 204, 140 S. E. 507.

Fractional legal estates and fractional equitable estates can not merge where the fractions are not the same. An equitable undivided interest in an equity of redemption can not merge with the legal fee. *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 204, 140 S. E. 507.

So a one-half undivided life-estate is not mergeable with a five sixths remainder in fee. Before there can be a merger of estates, the instrument alleged to convey the greater estate must convey an estate in the property in which the lesser estate exists, and must in fact convey in such property a greater estate than the lesser estate already carved therefrom. *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 204, 140 S. E. 507.

Equitable title of decedent and year's support were merged into estate by deed to widow and children. Her conveyance was limited to her interest. *Hines v. Moore*, 163 Ga. 415, 148 S. E. 162.

Interest under first mortgage merged into title of purchaser, under language of transfer. *Bank of Stephens v. Growers Finance Corp.*, 168 Ga. 108, 147 S. E. 113.

No merger by security-deed holder taking quitclaim deed and transfer of tax executions after judgment lien has intervened. *Pope v. Hammond*, 167 Ga. 821, 149 S. E. 204.

§ 3683. (§ 3107). Lien on one's own property.

In *McDuffie v. Merchants Bank*, 168 Ga. 231, 234, 147 S. E. 111, it is said: "The bank had no interest to protect as regarded the second tract of land embraced in the Forman security deed, by reason of the fact that the debt secured by the assignment of Mrs. McDuffie's bond for title had been fully paid, and by reason of the release referred to in the preceding paragraph. Consequently the purchase by the bank of the lien in Forman merely put the bank in every respect in Forman's shoes."

CHAPTER 4

Of Estates for Years

§ 3685. (§ 3109.) Definition.

Leasehold as Realty.—The plaintiff had a written lease from the owner of the premises in question, for a term of five years. This created an estate in realty in the lessee as an estate for years, if it be in lands, passes as realty in this State. *Anderson v. Kokomo Rubber Co.*, 161 Ga. 842, 846, 132 S. E. 76.

CHAPTER 5

Of Landlord and Tenant

§ 3691. (§ 3115). Relation of landlord and tenant exists, when.

A trustee in bankruptcy of a lessee has only the same

rights and interest that the tenant has under the contract of lease, and can not enforce a different contract. The lessee could not assign his lease without the consent of his landlord, and neither could the trustee in bankruptcy. *Cox v. Howell*, 37 Ga. App. 596, 141 S. E. 82.

§ 3692. (§ 3116.) Implied contract to pay rent.

Security Deed Given but Possession Retained.—One who makes to a creditor for the purpose of securing a debt, a deed to land, but retains possession of the land, does not thereby become the "tenant" either of such creditor or of his vendee. *Finn v. Reese*, 36 Ga. App. 591, 592, 137 S. E. 574. See also, *Ray v. Boyd*, 96 Ga. 808, 22 S. E. 916.

Cited in *Roberts v. Roberts*, 39 Ga. App. 810, 148 S. E. 606.

§ 3693. (§ 3117.) How created.

See notes to § 3574.

Applied in *Candler v. Smyth*, 168 Ga. 276, 147 S. E. 552.

§ 3694 (§ 3118.) Landlord not liable for negligence of tenant.

Duty and Liability of Landlord for Repairs.—It would seem that the degree of diligence required under the section in keeping the premises safe does not consist in either slight diligence or of extraordinary diligence, but rather consists of ordinary care, such as a prudent householder might reasonably be expected to exercise. See *Cuthbert v. Schofield*, 35 Ga. App. 443, 133 S. E. 303.

§ 3696. (§ 3120.) Removal of fixtures by tenant.

Under the provisions of this section of the code a tenant during the term or during a continuation thereof, or while he is in possession under the landlord, may remove such fixtures erected by him. After the term and possession are ended, they are regarded as abandoned to the use of the landlord, and become the latter's property. Accordingly, in the instant suit in trover to recover certain shelving supplied by the tenant for use in the rented property, the lease having expired, they could not be recovered, even as trade fixtures, if attached to the realty. *Powell v. Griffith*, 38 Ga. App. 40, 142 S. E. 466.

§ 3698. (§ 3122.) Estoppel.

Stated in *English v. Little*, 164 Ga. 805, 139 S. E. 678.

Section cited in *Hardeman v. Ellis*, 162 Ga. 664, 135 S. E. 195.

§ 3699. (§ 3123.) Repairs and improvements.

II. DUTY AND LIABILITY OF LANDLORD.

Extent of Landlord's Duty to Repair—Premises Suited for Purpose.—Except as provided by this section there is in this State, as at common law, no implied covenant that the premises are suitable for the purpose for which they are leased, or for the particular use for which they are intended by the tenant. *Cox v. Lowney Co.*, 35 Ga. App. 51, 132 S. E. 257. And an instruction that it is the duty of the landlord to make the premises suitable for the purpose intended is erroneous. *Id.*

In this case the court cites the decisions appearing under this catchline in the Georgia Code of 1926 and admits that they would seem to support a holding to the contrary. A nice distinction, however, is drawn between the duty to keep in repair and the duty to make repairs, and, on reason and principle, it appears that such a distinction is justifiable because if the property leased is inherently unfitted for purposes intended, irrespective of repairs, (in the principle case a basement as a candy storeroom) the tenant should be charged with notice of the inadequacies. The situation is analogous to that which exists when premises are leased which contain patent defects under which circumstances the landlord is not held accountable for repairs.—*Ed. Note.*

In a case where the landlord has fully parted with possession and right to the possession of the premises, there is no duty of inspection on his part for the purpose of discovering defects arising subsequent to the time of the lease, and he is, therefore, not liable to his tenant for injuries resulting from defects thus arising, unless he has had actual knowledge of them, or has been

notified of such defects and has failed to make repairs within a reasonable time and the tenant could not have avoided the injuries resulting therefrom by the exercise of ordinary care on his own part. *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615; *McGee v. Hardacre*, 27 Ga. App. 106 (2), 107 S. E. 563; *Kleinbert v. Lyons*, 39 Ga. App. 774, 148 S. E. 535.

§ 3700. (§ 3124.) Distress for rent.

Removal of Goods.—The intent and purpose of an agricultural tenant in removing crops grown on the rented premises is immaterial. *Wheeler v. Mote*, 37 Ga. App. 547, 140 S. E. 904.

Where, however, the rent of an agricultural tenant is payable in specifics, and where, under the terms of the rent agreement, the produce is to be delivered by the tenant by a certain date and at a warehouse beyond the limits of the rented premises, the tenant is authorized, in compliance with the terms of the rent agreement, to remove the produce called for by the contract to the place designated by the agreement, and to hold the same for the landlord in the place thus specified pending the maturity of the rent obligation. *Wheeler v. Mote*, 37 Ga. App. 547, 140 S. E. 904.

§ 3705. (§ 3129.) Title to cropper's crop in landlord.

Title to Crop—When Goes to Cropper.—For a case holding substantially with cases cited under this catchline in the Georgia Code of 1926, see *Folds v. Harris*, 34 Ga. App. 445, 129 S. E. 664.

Same—After Settlement and before Division.—Where there has been no division of the crop between the landlord and the cropper and where the cropper's portion of the crop has not been set aside, and thus the cropper has not received his part of the crop, no title to the crop passes into him, although he may have settled with the landlord for all advances made. *Atlanta Trust Co. v. Oliver-McDonald Company*, 36 Ga. App. 360, 136 S. E. 824.

Same—Interest of Landlord.—A landlord's interest in the title to crops grown by his cropper is only to the extent of the value of the landlord's portion of the crops, as well as of any indebtedness for advances made to the cropper. *Franklin v. Tanner*, 34 Ga. App. 254, 129 S. E. 114.

Trover against Third Person.—A landlord, who has not settled with his cropper but has received only a part of the crops to which he is entitled and whose interest in the remaining crops is in an amount less than their value, can, in a trover suit for their conversion against a third person, who has acquired them by purchase from the cropper, recover only to the extent of the amount of his claim against the cropper. *Franklin v. Tanner*, 34 Ga. App. 254, 129 S. E. 114.

Illustration.—Under this section and § 3707 the title to the bale of cotton and the cottonseed levied on, of a crop raised by the claimant, a cropper on land of his landlord, the defendant in execution, was in the landlord, and not in the cropper, the crop not having been divided between them and the cropper being indebted to the landlord for supplies. The property levied on, therefore, was not subject to the execution, and the judge of the superior court erred in not sustaining the certiorari from the verdict in the justice's court which found the property subject. *Cavin v. McWhorter*, 37 Ga. App. 477, 140 S. E. 778.

Under the provisions of this section where land is cultivated for the owner by a share-cropper, pursuant to the legal relation of landlord and cropper, the landlord until he has received his part of the crops and has been fully paid for all advances made to the cropper in the year in which the crops were raised, to aid in making the crops, ordinarily has such possession of the crops as will authorize the issuance of a possessory warrant at his instance to recover possession of the crops from a third person who takes possession thereof without his consent and without other lawful warrant or authority. *Whitworth v. Carter*, 39 Ga. App. 625, 147 S. E. 904.

§ 3707. (§ 3131.) Cropper.

See notes to sec. 3705.

§ 3711. (§ 3135.) Casualties no abatement of rent.

What Amounts to Eviction.—Where a landlord enters upon the rented premises for the ostensible purpose of

making repairs, irrespective of whether it is in conformity with a legal obligation due to his tenant, or whether it is for the purpose of protecting his own property, if his conduct consists of negligent acts of such grave and permanent character as would render the premises unfit for tenancy, and is such as would legally import the intent to deprive the tenant of their enjoyment, it amounts in law to an eviction of the tenant, and the landlord can not thereafter recover subsequently accruing rent. *Feinberg v. Sutker*, 35 Ga. App. 505, 134 S. E. 173.

§ 3712. Interfering with certain relations.

Section Compared with Section 125 of Penal Code.—This section and the following section (section 3713) make it unlawful to do the things therein specified, even though there would be no conflict with the employee's duty under his contract of employment, which is something quite different from enticing, persuading, or decoying the servant to desert his employer during his term of service, as prohibited by section 125 of the Penal Code. Therefore, the ruling as to the Constitutional invalidity of this section and the following section is not to be applied to that section of the Penal Code. *Rhoden v. State*, 161 Ga. 73, 78, 129 S. E. 640.

CHAPTER 6

Of Estates on Condition

§ 3716. (§ 3136). Definition.

Applied in *Hollomon v. Board of Education*, 168 Ga. 359, 364, 147 S. E. 882.

§ 3717. (§ 3137.) Precedent and subsequent.

Section cited in *Grantham v. Royal Insurance Co.*, 34 Ga. App. 415, 130 S. E. 589.

§ 3721. (3141.) Effect of breach of condition.

Necessity of Entry to Revest Estate.—The grantor in a deed containing a condition subsequent, upon a breach thereof, is not revested with the title until there has been an entry. *Barnesville v. Stafford*, 161 Ga. 588, 592, 131 S. E. 487.

CHAPTER 7

Of Tenancy in Common

§ 3723. (§ 3143). Definition of tenancy in common.

Rule Stated—Trustee and Cestui Que Trust.—If a trustee acquires title to specific realty for his individual use and also for the use of his cestui que trust, the entire estate will be an estate in common, and the trustee and the cestui que trust will be tenants in common. *Carmichael v. Citizens & Southern Bank*, 162 Ga. 735, 134 S. E. 771.

§ 3724. (§ 3144). Rights and liabilities of cotenants.

Action by Adverse Claimant against Cotenant.—Proof of title of tenants in common to land from which timber has been cut and removed by one of them, superior to the title of an adverse claimant, will entitle the tenant so cutting and removing the timber to its proceeds, as against such adverse claimant, notwithstanding the fact that the tenant cutting and removing the timber in such proceeding alleges ownership of the land and timber in severalty. *Horn v. Towson*, 163 Ga. 37, 135 S. E. 487.

§ 3725. (§ 3145). Adverse possession.

Possession by Widow.—Prescriptive title not be predicated on possession by widow to whose children unde-

scribed land was set apart as year's support. *Newsome v. Moore*, 166 Ga. 301, 143 S. E. 400.

§ 3727. (§ 3147). Accounting between cotenants.

Encumbrance of Estate—Cotenant's Superior Lien.—This section does not make the claim for indebtedness superior to a security deed made by the tenant in common individually, purporting to convey his undivided interest in the realty to a third person as security for his personal obligation. *Carmichael v. Citizens & Southern Bank*, 162 Ga. 735, 134 S. E. 771.

CHAPTER 8

Of Trust Estates, Trusts and Trustees, and Deeds to Interests in Property for its Improvement

ARTICLE 1

Of Their Creation and Nature

§ 3728. (§ 3148). Definition.

Stated in *Macy v. Hays*, 163 Ga. 478, 485, 136 S. E. 517.

§ 3733. (§ 3153). Express, etc.

See note to § 2366(70).

There can be no expressed trust unless it is created in writing. *Macy v. Hays*, 163 Ga. 478, 485, 136 S. E. 517.

Examples of application will be found in *Macy v. Hays*, 163 Ga. 478, 136 S. E. 517.

§ 3736. (§ 3156). Execution of trusts.

Illustration of Executory Trusts.—The following case is an example of an executory trust. *Burton v. Patton*, 162 Ga. 610, 134 S. E. 603.

§ 3739. (§ 3159). Implied trusts.

See notes to § 2366(70).

Money Must Be Paid at or before Purchase.—For a case reiterating the principle declared in the cases under this catchline in the Georgia Code of 1926, see *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Must Have Paid as Own.—In the first paragraph of this section, the person in whose favor a trust is claimed to result must have paid the purchase-money as his own. If he merely advances the whole or a part of the purchase-money as a loan, no implied trust arises. *Magd v. Byrd*, 164 Ga. 609, 618, 139 S. E. 61, citing *Johnston v. Coney*, 120 Ga. 767, 776, 48 S. E. 373.

Only a Portion Need Be Paid.—An implied trust results from the fact that one person's money has been invested in land and the conveyance taken in the name of another. Such implied trust may arise from the payment of a portion of the purchase money. *Berry v. Brunson*, 166 Ga. 523, 143 S. E. 761.

To set up and establish such implied trust it is only necessary to allege and prove that one person furnished all or a portion of the purchase-money of the land, and that the deed was taken in the name of the person to whom the money was so furnished. *Berry v. Brunson*, 166 Ga. 523, 143 S. E. 761.

When Member of Firm Holds Land for Other Members.—Where land is bought in whole or in part with money contributed by one of the members of a firm, and the legal title is taken in the name of the other members, under an agreement that the latter is to hold the land for the use of the firm, an implied trust arises in favor of the partnership, and the members become equitable owners and equitable tenants in common of the land. *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Express Authorization.—An implied trust ex maleficio did not arise from the use of bonds in paying for

property in part, as he was expressly authorized to use them for this purpose. *Magid v. Byrd*, 164 Ga. 609, 139 S. E. 61.

Pleading—Sufficiency of Allegation.—For case wherein the allegations of the petition as amended, construed most strongly against the pleader, were held not to raise an implied trust upon the principles of this section, see *Drake v. Drake*, 161 Ga. 87, 129 S. E. 635.

Evidence.—To engraft an implied trust upon an absolute deed by parol evidence, such evidence ought to be clear and satisfactory. *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Proof.—Ordinarily, where one person seeks to enforce an implied trust in land because it was paid for in part by his money and title thereto was taken in the name of another, he must prove the amount of his money so used; but where real estate is purchased with funds of a partnership, contributed by both members, and title is taken in the name of one of the members under an agreement that he is to hold the same for the use of the firm, this rule does not apply. The partner seeking to enforce the implied trust arising under these circumstances will not be required to show the specific amount of the funds contributed by him to the partnership capital which went into the purchase thereof. *McDonald v. Dabney*, 161 Ga. 711, 732, 132 S. E. 547.

Paragraph Applied in *Stonecypher v. Coleman*, 161 Ga. 403, 410, 131 S. E. 75; *Manget v. Carlton*, 34 Ga. App. 556, 559, 130 S. E. 604; *Carmichael v. Citizens, etc., Bank*, 162 Ga. 735, 134 S. E. 771.

Applied also in *Hollomon v. Board of Education*, 168 Ga. 359, 364, 147 S. E. 882.

ARTICLE 2

Of Trustees; Their Appointment, Powers, Etc.

§ 3744. (§ 3164). Proceeding at chambers.

Personal interest of trustees conflicting with that of trust estate, ground for removal in equity. *Clark v. Clark*, 167 Ga. 1, 144 S. E. 787.

§ 3753. (§ 3170). Duty of trustees.

Power of a trustee to retain investments received from the creator of the trust is, in the absence of contrary statute or provision in the instrument creating the trust, not different from his power to make investments; and where testamentary trustees receive, as a part of the trust estate, stock in manufacturing corporations, they are not justified, in the absence of some authority to the contrary in the instrument creating the trust, in continuing such investments, though made by the testator. It is their duty to convert said stocks into money within a reasonable time, and invest the proceeds in securities authorized by law or by an order of the superior court. Otherwise they are liable for loss arising from depreciation in value of such stock. *Clark v. Clark*, 167 Ga. 1, 2, 144 S. E. 787.

§ 3755. (§ 3172). Sales by trustee.

Cited in dissenting opinion in *Clark v. Clark*, 167 Ga. 1, 18, 144 S. E. 787.

§ 3762. (§ 3179). Purchaser with notice.

Notice of Trust Relationship—What Instrument Notice of.—A purchaser of land is charged with notice of recitals in the deed to his vendor, to the effect that the land was purchased with proceeds of the sale of trust funds. *Carmichael v. Citizens, etc., Bank*, 162 Ga. 736, 134 S. E. 771. Citing *Cheney v. Rodgers*, 54 Ga. 168; *Hancock v. Gumm*, 151 Ga. 667, 107 S. E. 872, 16 A. L. R. 1003; *Rosen v. Wolff*, 152 Ga. 578, 585, 110 S. E. 877. But he is not charged with notice of such recitals when contained in a deed by the vendor to another person, even though the deed purports to convey a part of the same general tract. The recital, in order to charge notice to the purchaser, must be in an instrument constituting a link in his chain of title. *Carmichael v. Citizens, etc., Bank*, supra, citing, *Hancock v. Gumm*, supra.

Innocent Purchaser from Purchaser with Notice.—If a grantee in the security deed, with notice of the equity of the claimants in the hands therein conveyed, transferred for

value a note thereby secured to another without notice of such equity and who took the same in good faith, the latter acquired at least an equitable interest in such land as a purchaser, and holds such interest free from the secret equity of the claimants and the implied trust set up. *First Nat. Bank v. Pounds*, 163 Ga. 551, 136 S. E. 528.

§ 3773. (§ 3189). Lien on estates for trust funds.

When Funds of Estate Loaned.—When an administrator deposits with, or lends to, a firm of which he is a partner the funds of the estate which he represents, and the same are mingled with the funds of the firm and used in its business, upon the dissolution of the firm by the death of such partner (the administrator) the beneficiary of the trust fund thus misapplied has a lien upon the assets of the firm in the hands of the surviving partner, superior to those of the firm's unsecured creditors. *Miller & Co. v. Gibbs*, 161 Ga. 698, 132 S. E. 626.

ARTICLE 3

Of Trusts and Trustees

§ 3779. (§ 3195). Trusts.

In General.—If the trustee omits to act when required by duty to do so, or is wanting in necessary care and diligence in the due execution of the trust which he has undertaken, a court of equity will interpose. The relief granted will always be molded and framed so as to render the trust effectual, and secure the best interests of all parties. A court of equity, having assumed jurisdiction over the trust for one purpose, will give effect to all the rights of the beneficiaries. *Clark v. Clark*, 167 Ga. 1, 18, 144 S. E. 787.

Applied in *Manget v. National City Bank*, 168 Ga. 876, 882, 149 S. E. 213.

§ 3780. (§ 3196). When court will declare one a trustee.

Section Quoted in *McDonald v. Dabney*, 161 Ga. 711, 731, 132 S. E. 547.

§ 3781. (§ 3197). Want of trustee.

Appointment by Court for Educational and Religious Trusts.—For a case following, in a material manner, the principle enunciated in the first paragraph under this catchline in the Georgia Code of 1926, see *Dominy v. Stanley*, 162 Ga. 211, 133 S. E. 245.

§ 3785. (§ 3201). Tracing assets.

When Traceable May Always Follow.—The beneficiary of a trust may always follow the trust funds wherever they can be traced. *Miller & Co. v. Gibbs*, 161 Ga. 698, 707, 132 S. E. 626.

Need Not Show Investment in Specific Property.—It is not indispensably necessary for the beneficiary, in order to trace trust funds, to show that they have been invested in specific property by the trustee or the person aiding the trustee in the misapplication of the funds. *Miller & Co. v. Gibbs*, 161 Ga. 698, 708, 132 S. E. 626. But it is necessary that they should be clearly traced and identified either in original or substitute form. *Id.*

Same—Ober v. Cochran Reconciled.—In *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, Mr. Presiding Justice Fish used some language which at first blush might seem to conflict with the rule as announced by the Georgia Courts. That language is: "In order to recover a trust fund which has been misapplied by the trustee or person holding it in a fiduciary character, it must be clearly identified or distinctly traced into the property, fund, or chose in action which is to be made subject to replace it." This does not mean that the trust fund can not be traced into the general property or funds of such trustee or person holding it in a fiduciary capacity. If the funds can be traced into the general property or funds of such trustee or person, the trust will be enforced. *Miller & Co. v. Gibbs*, 161 Ga. 698, 709, 132 S. E. 626.

ARTICLE 4

Claims Against Trust Estates

§ 3786. (§ 3202). Claims against trust estates, etc.

Necessary Parties.—Under this section et seq., a claim against a trust estate may be enforced in a court of law, and in such a case the trustees are the only necessary parties. *Zeigler v. Perry*, 37 Ga. App. 647, 141 S. E. 426.

SEVENTH TITLE

Of Title and Mode of Conveyance

CHAPTER 1

Of Title by Grant

ARTICLE 3

Processioning

§ 3818. (§ 3244). What is processioning.

When There Is No County Surveyor.—While, under the provisions of this section et seq., it is the duty of processioners, upon proper application, to “appoint a day when a majority of them, with the county surveyor, will trace and mark the said lines,” when there is no county surveyor the processioners may, under the provisions of section 603 of the Civil Code, specially engage any competent person, a citizen of the county, to perform his duties, provided such person is first sworn to “do the same skillfully, faithfully, and impartially, to the best of his knowledge; or, in default of such person, the county surveyor of an adjoining county may officiate.” *Tisinger v. Ellerbee*, 37 Ga. App. 391, 140 S. E. 522.

§ 3820. (§ 3246). Rules in disputed lines.

When Construction Most Favorable to Grantee Prevails.—Where all other means of ascertaining the true construction of a deed fails, and a doubt still remains, that construction is rather to be preferred which is most favorable to the grantee. *Holder v. Jordan Realty Co.*, 163 Ga. 645, 650, 136 S. E. 907, citing *Tyler on Boundaries*, 119, 120; *Harris v. Hull*, 70 Ga. 831.

Section Given in Charge.—As to a case sustaining a trial judge’s charge to the jury involving a substantial portion of the section, see *Cherokee Ochre Co. v. Georgia Ochre Co.*, 162 Ga. 620, 134 S. E. 616.

In *Butler v. Lovelace-Eubanks Lumber Co.*, 37 Ga. App. 74, 76, 139 S. E. 83, it was held that the reference in the charge to the provision of this section was not authorized, one of the main contentions of the defendant being that a large rock, placed by nature, constituted one of the dividing corner-marks, fixing the beginning point of the true but disputed line between the adjoining premises.

The instructions in which the court gave in charge to the jury the principles of section 3820 of the Civil Code of 1910, referring to natural landmarks and ancient or genuine landmarks, and as to the general reputation in the neighborhood as to ancient landmarks of more than thirty years standing, even if not adjusted to the evidence, could not have misled the jury upon the idea that the tree referred to in *Thompson’s* evidence as having been marked by Killen “was evidence of an ancient landmark which might control the jury.” The error, therefore, was not of sufficient materiality to have injured the plaintiff or to require the grant of a new trial. *Blackwell v. Houston County*, 168 Ga. 248, 147 S. E. 574.

§ 3821. (§ 3247). General reputation, when evidence.

Binding on Grantees.—See *Booker v. Booker*, 36 Ga. App. 738, 138 S. E. 251, for a case following the cases cited under this catchline in the Georgia Code of 1926.

Conventional Agreement to Establish Acquiescence.—It is not essential that the acquiescence be manifested by a conventional agreement. *Sapp v. Odom*, 165 Ga. 437, 141 S. E. 201.

Acquiescence by conduct for a period of time less than seven years will not suffice to establish a dividing line between adjoining-land owners, in virtue of this section. *Sapp v. Odom*, 165 Ga. 437, 141 S. E. 201, citing *McAleer v. Glover*, 146 Ga. 369, 91 S. E. 114; *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. R. 212.

A line may be established under this section irrespective of whether its true location was theretofore actually unascertained or disputed. *Yarbrough v. Stuckey*, 39 Ga. App. 265, 145 S. E. 160.

Cited in *Tyson v. Anderson*, 164 Ga. 673, 139 S. E. 410.

§ 3822. (§ 3248). Adverse possession.

Applied in *Yarbrough v. Stuckey*, 39 Ga. App. 265, 147 S. E. 160.

§ 3823. (§ 3249). Protest and appeal to superior court.

Discrepancies in Dower Plat and Processioners.—Where it appeared conclusively that the surveyor for the processioners followed the line between the lands of the litigants as shown by the dower plat, any errors made upon the lines between other landowners, or any discrepancies in the dower plat and the plat made by the processioners, were immaterial and harmless. *Groover v. Durrence*, 36 Ga. App. 543, 137 S. E. 299.

Survey of Other Boundaries.—Where the only dispute is over the dividing line between two tracts of land, a survey of other boundaries is unnecessary. *Groover v. Durrence*, 36 Ga. App. 543, 137 S. E. 299.

§ 3824(1). Instruments to be bought for surveyors.—In counties of Georgia having a population of not less than 39,841 and not more than 39,845, according to the United States Census of 1920, the Boards of Roads and Revenues, County Commissioners, or Ordinary, as the case may be, shall purchase for the county surveyor a modern instrument or compass for his use while in office. Acts 1929, p. 168, § 2.

CHAPTER 2

Of Title by Will

ARTICLE 1

Of the Nature of Wills, by Whom and How Executed

§ 3828. (§ 3254). Form.

III. INSTRUMENTS HELD TO BE DEED.

Reserving Right to Dispose of Land.—The court erred in restricting to a limited purpose an instrument in writing tendered by the defendant, upon the ground that the instrument offered was testamentary in character and not a deed. The paper offered had all the essential terms of a deed, and was not rendered testamentary in character by the clause reserving to the grantor the right to dispose of the land in fee simple. *Smith v. Smith*, 167 Ga. 368, 145 S. E. 661.

§ 3830. (§ 3256). Mutual wills.

In General.—Mutual wills are those which contain reciprocal provisions, giving the separate property of each testator to the other. *Clements v. Jones*, 166 Ga. 738, 144 S. E. 319.

Agreements to make wills are not established merely because two persons simultaneously make reciprocal testamentary dispositions in favor of each other, when the language of such wills contains nothing to the effect that the instruments are the result of a contract. Where mutual wills are the result of a contract based upon a valid consideration, and where after the death of one of the parties the survivor has accepted benefits under the will of the other which was executed pursuant to an agreement, equity will, where the facts are fully proved, interpose to prevent fraud, and will compel the execution of such agreement by the survivor. *Clements v. Jones*, 166 Ga. 738, 144 S. E. 319.

Revocation.—Mutual wills, even with a covenant against revocation, can still be revoked. *Clements v. Jones*, 166 Ga. 738, 144 S. E. 319.

The general rule is, that if two persons execute wills at the same time, either by one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation. *Clements v. Jones*, 166 Ga. 738, 144 S. E. 319.

§ 3832. (§ 3258). Power of testators.

Providing for Creation of Corporation.—A testator under the laws of this State can provide by his will for the creation by his executors of a corporation to which the executors shall convey the residue of his estate for the purpose of carrying on his general business. *Palmer v. Neely*, 162 Ga. 767, 135 S. E. 90.

Cited in *Chauncey v. Barlow*, 166 Ga. 156, 142 S. E. 673; *Deans v. Deans*, 166 Ga. 555, 144 S. E. 116.

§ 3834. (§ 3260). Will should be voluntary.

Definition of Undue Influence.—Undue influence, to invalidate a will, must amount to force or fear—must, in effect, make the will the mental offspring of some other person, and must be operative on the mind of the testator at the time the will is executed. It must destroy the free agency of the testator and constrain him to do what is against his will, but what he is unable to refuse. *Galloway v. Hogg*, 167 Ga. 502, 524, 146 S. E. 156, citing *Potts v. House*, 6 Ga. 324, 50 Am. D. 329; *Morris v. Stokes*, 21 Ga. 552; *Thompson v. Davitte*, 59 Ga. 472; *DeNief v. Howell*, 138 Ga. 248, 251(6), 75 S. E. 202.

§ 3840. (§ 3266). Insane persons.

Monomania under This Section—Particular Type of Mania.—Mania is a form of insanity accompanied by more or less excitement, which sometimes amounts to fury. The person so affected is subject to hallucinations and delusions, and is impressed with the reality of events which have never occurred and things which do not exist, and his actions are more or less in conformity with his belief in these particulars. *Hall v. Unger*, 11 Fed. Cas. 261, 263 (No. 5949). This mania may extend to all objects; or it may be confined to one or a few objects, in which latter case it is called monomania. *Dyar v. Dyar*, 161 Ga. 615, 628, 131 S. E. 535.

§ 3841. (§ 3267). Eccentricity, imbecility, etc.

Rule of Evidence.—The section is a rule of evidence, and may be given in charge on an issue of *devisavit vel non*, without specially pleading such rule, where there is evidence to authorize such charge. *Dyar v. Dyar*, 161 Ga. 615, 623, 131 S. E. 535.

An instruction undertaking to give the principle of this section was held inadequate in *Galloway v. Hogg*, 167 Ga. 502, 146 S. E. 156.

§ 3842. (§ 3268). Amount of capacity necessary.

Standard of Mental Capacity—Charges.—In his charge to the jury the judge gave certain instructions which would probably lead the jury to conclude that the capacity to contract was identical with the capacity to make a valid will; and this identity does not exist. Such instructions

were erroneous. *Tarlton v. Richardson*, 163 Ga. 553, 136 S. E. 526.

§ 3846. (§ 3272). Formalities of execution.

II. SIGNATURE OF TESTATOR.

Testator's Name Signed by Another.—Where a person's name is signed for him, at his direction and in his presence, by another, the signature becomes his own. The relationship of principal and agent is not thereby created, nor does the doctrine of such a relationship become involved. *Neal v. Harber*, 35 Ga. App. 628, 134 S. E. 347.

Acknowledgment of Signature.—It is absolutely necessary that the attesting witnesses either actually see the testator sign the instrument, or that the testator acknowledge his signature thereto either expressly or impliedly. *Wood v. Davis*, 161 Ga. 690, 693, 131 S. E. 885.

§ 3850. (§ 3276). Knowledge of contents.

Under the evidence, a finding that the testatrix had knowledge of the contents of the will was demanded. *Cook v. Washington*, 166 Ga. 329, 143 S. E. 409.

§ 3851. (§ 3277.) Charitable devises.

In General.—If a testator leave a wife or child or descendant of child, and the will be executed less than ninety days before the testator's death, a devise therein to a charitable use is void. *Wesley Memorial Hospital v. Thompson*, 164 Ga. 466, 139 S. E. 15.

Execution within Ninety Days of Death.—Under this section a bequest to an educational institution by will which was executed less than 90 days before death is void. *Southern Industrial Inst. v. Marsh*, 15 Fed. (2d), 347.

ARTICLE 2

Of Probate and Its Effect

§ 3863. (§ 3289). Copy of a will, when established.

Charge to jury in language somewhat stronger than this section held no cause for reversal. *Peck v. Irwin*, 168 Ga. 442, 148 S. E. 88.

§ 3864. (§ 3290.) Original will to remain in office.

Section Cited in *Young v. Certaineed Products Corp.*, 35 Ga. App. 419, 133 S. E. 279.

§ 3870. (§ 3296.) Admission of executor, etc.

Origin.—This section had its origin in codification, and not in statute. *Brown v. Kendrick*, 163 Ga. 149, 154, 135 S. E. 721.

General Rule Stated.—It has been held that declarations made before its execution, by parties who afterwards become legatees under the will, are not admissible against the validity of the will. *Brown v. Kendrick*, 163 Ga. 149, 154, 135 S. E. 721, citing 2 Schouler on Wills (6th ed), section 809; *In re Ames*, 51 Iowa, 596 (2 N. W. 408); *Burton v. Scott*, 3 Rand. 399, 407; *Thompson v. Thompson*, 13 Ohio St. 356, 363.

Executor Who Is Propounder and Legatee.—See *Brown v. Kendrick*, 163 Ga. 149, 154, 135 S. E. 721, which upholds the doctrine of the case under this catchline in the Georgia Code of 1926.

ARTICLE 3

Probate of Foreign Wills

§ 3873. (§ 3299.) What requisite if land devised.

Sections 3873-3880 Explained.—Under sections 3873-3880 a

foreign will can be probated, and Georgia property willed thereunder can be administered, only by such resident executor as may be named therein, or, if none, by a resident administrator with the will annexed, appointed at the instance of any heir, legatee, distributee, devisee, or creditor of the testator. The purpose and effect of the act of 1894, now incorporated in these sections, is not only to require the domestic probate of foreign wills before Georgia property can be administered thereunder, but also to prohibit such probate and the administration of Georgia property willed thereunder by any person other than a resident executor or a resident administrator with the will annexed, selected and appointed as therein provided, to the exclusion of the executor therein named or any administrator with the will annexed appointed elsewhere. *League v. Churchill*, 36 Ga. App. 681, 137 S. E. 800; S. C. 164 Ga. 36, 137 S. E. 632.

§ 3880. (§ 3306). No foreign executor to act after January 1st, 1895.

See notes to § 3872.

ARTICLE 4

Of the Executor

§ 3886. (§ 3310). Executor de son tort.

In a suit by an heir at law of an estate to recover of the defendants under authority of this section, for having, as executors de son tort, intermeddled with the property belonging to the estate and converted it to their own use, the plaintiff's right to recover can in no wise be affected by the fact that advancements had been made to him by the intestate in her lifetime, or by the fact that one of the defendants had performed services for the intestate. *Herrington v. Herrington*, 38 Ga. App. 596, 144 S. E. 673.

§ 3892. (§ 3316). Powers, duties, and liabilities.

When land has been sold at an administrator's sale, and a lien thereon transferred by virtue of this section to the proceeds, such lien should be paid from such proceeds. In such circumstances the plaintiffs could proceed to assert their equitable right to have their lien paid out of the proceeds of the executors' sale. They can not obtain a general judgment de bonis decedentis, but can only claim that the fund arising from the property, or so much thereof as might be necessary, should be applied to the payment of their lien, subject, however, to have legitimate defenses raised as to the legality and priority of their attorney's lien, or the amount due thereon. *Midleton v. Westmoreland*, 164 Ga. 324, 331, 138 S. E. 852.

ARTICLE 5

Of Devises and Legacies

§ 3895. (§ 3319). Assets to pay debts.

See notes to § 5358.

Title in Executor Until Assent.—Title to the property must be vested in some one during the period of administration, and in case of a will it vests in the executor. Under the plain language of this section it can not be in the devisee or legatee. *Willingham v. Watson*, 165 Ga. 870, 872, 142 S. E. 458.

Not applied in suit by widow to cancel deed by testator (of date later than his will), for mental incapacity. *McLarty v. Abercrombie*, 168 Ga. 745, 149 S. E. 30.

§ 3896. (§ 3320.) Effect of assent.

Effect of Assent Where Debts Made Permanent to Will.—Where executors, directed to carry out business ventures of testator, incurred debts pursuant to will, they could not thereafter interfere with rights of creditors by assenting to

devises or legacies. *Holt v. Daniel Sons & Palmer Co.*, 8 Fed. (2d), 700.

Such assent perfects the inchoate title of the legatee, and, once given, is generally irrevocable. *Citizens Bank of Vidalia v. Citizens & Southern Bank*, 160 Ga. 109(2), 127 S. E. 219; *Cull v. Cull*, 39 Ga. App. 164, 146 S. E. 559.

§ 3900. (§ 3324.) Intention of testator.

I. IN GENERAL.

This section was the law before there was a Code. *Payne v. Brown*, 164 Ga. 171, 174, 137 S. E. 921.

When May Have Effect as It Stands.—In the instant case the trial judge did not err in rejecting parol evidence tending to show that the testator instructed the scrivener to so draw the will as to give to his brother and sister an estate in remainder in the property real and personal given his wife for life or widowhood under his will, when the will, as it stands, may have effect. *Hill v. Hill*, 161 Ga. 356, 359, 130 S. E. 575.

Applied in *Coleman v. Harrison*, 168 Ga. 859, 866, 149 S. E. 141.

§ 3906. (§ 3330.) Lapsed legacies.

"Execute" Synonymous with "Made."—The word "executed" in the phrase "when the will is executed," as used in the section is synonymous with the word "made." *MacIntyre v. McLean*, 162 Ga. 280, 133 S. E. 471.

§ 3908. (§ 3322.) Ademption of legacy.

Where testatrix never became possessed of the property bequeathed this section cannot apply. *Adams v. Bishop*, 164 Ga. 367, 138 S. E. 849.

§ 3909. (§ 3333.) Substitution.

Like Kind or Character.—Land held by absolute deed is not property of "like kind" with a note secured by a deed to the same land, within the meaning of this section. *Morgan v. Wolpert*, 164 Ga. 462, 139 S. E. 15.

§ 3910. (§ 3334.) Election.

Renouncing Inconsistent Rights.—For a case following the doctrine embodied in the note under this catchline in the Georgia Code of 1926, see *Robinson v. Ramsey*, 161 Ga. 1, 10, 129 S. E. 837.

§ 3913. (§ 3337.) Devise changed from real to personal property, and vice versa.

Proceeds of Realty Treated as Personality.—On the theory of equitable conversion, the proceeds of real estate sold under a power of sale conferred by the will of a decedent are usually regarded as personal assets of the estate. *Brown Guano Co. v. Bridges*, 34 Ga. App. 652, 655, 130 S. E. 695, citing 11 R. C. L. 120.

ARTICLE 7

Of Nuncupative Wills

§ 3925. (§ 3349.) Nuncupative wills, when good.

Supersedes § 20 English Statute of Frauds.—Section 20 of the English statute of frauds (29 Car. II, c. 3) is not of force in this State, having been superseded by this section. *Robinson v. Jones*, 167 Ga. 38, 144 S. E. 774.

Cited and partially stated in *Felker v. Taylor*, 162 Ga. 433, 134 S. E. 52.

§ 3926. (§ 3350.) When proved.

Partially Stated in *Felker v. Taylor*, 162 Ga. 433, 134 S. E. 52.

CHAPTER 3

Of Title by Descent and Administration

ARTICLE 1

Of Inheritable Property and the Relative Rights of the Heirs and Administrator

§ 3929. (§ 3353.) Descent to heirs.

Realty—Equitable Estate Therein.—When the father of the plaintiffs died intestate, holding possession of lands under bonds for title with a part of the purchase-money paid, he had a beneficial interest or equitable estate therein. Upon his death this interest or estate descended to his heirs at law. *Stonecypher v. Coleman*, 161 Ga. 403, 409, 131 S. E. 75.

Where on a sale of land the purchaser pays a part of the purchase-money in cash and receives from the seller a bond for title obligating the seller to convey the land on payment of the balance of the purchase-money, the purchaser has a beneficial or equitable estate in the land, and where the purchaser dies intestate the estate passes directly to his heirs at law. *Weems v. Kidd*, 37 Ga. App. 8, citing *Stonecypher v. Coleman*, 161 Ga. 403, 131 S. E. 75; *Gholston v. Northeastern Banking Co.*, 158 Ga. 291, 293, 123 S. E. 11, 35 A. L. R. 23; *Dunson v. Lewis*, 156 Ga. 692, 700, 119 S. E. 846.

Applied in *Hefner v. Fulton Bag & Cotton Mills*, 37 Ga. App. 801, 142 S. E. 303.

§ 3931. (§ 3355.) Rules of inheritance.

See notes to §§ 3092, 2366(49).

Wife "Heir" of Husband.—The widow of a deceased person is not, strictly speaking, an heir at law of her husband. *Haddock v. Callahan Grocery Co.*, 163 Ga. 204, 135 S. E. 747.

The life-tenant not having exercised the power of disposition by will, at her death the living son and the living daughter of the grantor took each a fourth interest in the land, and each of two sets of grandchildren of the grantor took a fourth interest per stirpes as heirs of the grantor by representation. *Baynes v. Aiken*, 166 Ga. 898, 144 S. E. 736.

§ 3933. (§ 3357.) Right of administrator.

Applied in *Usry v. Cato*, 168 Ga. 240, 146 S. E. 905.

§ 3934. (§ 3358.) May recover from heirs, etc., when.

See § 5240.

ARTICLE 2

Of Administration

SECTION 1

Different Kinds of Administrators and Rules for Granting Letters

§ 3935. (§ 3359.) Temporary letters.

"Effects" as used in this section means personalty. Rents accruing after death are no part of the "effects" of the deceased. Rents accruing and unpaid at the time of death would be. *Lee v. Moore*, 37 Ga. App. 279, 139 S. E. 922, citing *Collins v. Henry*, 155 Ga. 886(1), 889, 118 S. E. 729; *Autrey v. Autrey*, 94 Ga. 579, 20 S. E. 431.

§ 3943. (§ 3367.) Rules for granting letters.

Sister's Rights Prior to Nieces and Nephews.—Where a

man died intestate leaving no wife nor any relatives except one sister and the children and grandchildren of four deceased sisters and one deceased brother, all said relatives being sui juris and qualified to administer on the estate, the person selected in writing by the sister of the intestate was entitled to letters of administration in preference to the person selected in writing by a majority of the children of the intestate's deceased sisters and brother, although these constituted a majority both numerically and in point of interest. *Dawson v. Shave*, 162 Ga. 126, 132 S. E. 912.

SECTION 3

The Appointment of Administrators, Their Bond and Removal

§ 3972. (§ 3396.) Bond of administrator.

Liability of Administrator and Sureties.—The condition requires the administrator to account for all the money and property belonging to the estate he administers and coming into his hands as such administrators, and to distribute such money and the proceeds of such property in accordance with law. The sureties on the bond of such an administrator are liable for any breach of the condition of the bond, including any failure of the administrator to discharge faithfully his duty in collecting and preserving and distributing the assets of the estate. *Ellis v. Geer*, 36 Ga. App. 519, 137 S. E. 290.

§ 3974. (§ 3398.) Suit on bonds.

Liability Joint and Several.—The obligation of an administrator and the sureties on his bond is joint and several. *Ellis v. Geer*, 36 Ga. App. 519, 137 S. E. 290.

Suits against Sureties Alone.—For a case following cases under this catchline in the Georgia Code of 1926, see *American Surety Co. v. Macon Savings Bank*, 162 Ga. 143, 147, 132 S. E. 636.

Compared with Section 3054.—In *American Surety Co. v. Macon Savings Bank*, 162 Ga. 143, 147, 132 S. E. 636, it was said to be manifest, by a comparison of the two sections [this section and section 3054] that while the language used in each is somewhat different, the purpose of the codifiers was the same.

Suit lies on bond of administrator, without joining him, after judgment de bonis and entry of nulla bona. *Hunter v. Burson*, 168 Ga. 60, 147 S. E. 53.

The effect of this section is to permit a suit to be brought on the bond in the first instance against the administrator and his sureties. *Bailey v. McAlpin*, 122 Ga. 616(5), 50 S. E. 388; *Hunter v. Burson*, 168 Ga. 59, 147 S. E. 53.

SECTION 5

Of Managing the Estate and Paying the Debts

§ 4001. (§ 3525.) Estate bound for debts.

See notes to § 3341.

Paragraph Five.—Cited in *Eason v. Kicklighter*, 167 Ga. 63, 144 S. E. 770.

§ 4004. (§ 3428.) Compromises by administrator.

Provisions Must Be Followed.—An agreement by a guardian to compromise an indebtedness due to the ward is invalid in the absence of the compliance by the guardian with any of the provisions of this and the two following sections. *Nix v. Monroe*, 36 Ga. App. 356, 136 S. E. 806.

§ 4005. (§ 3429.) May make compromise.

Provisions Must Be Followed.—See same catchline under section 4004.

§ 4006. (§ 3430.) Trustee may compromise claims.

Requirements of Section Requisite to Compromise.—See note "Provisions Must Be Followed" under section 4004.

§ 4009. (§ 3433.) Debts barred by limitation.

Applied in Wardlaw v. Withers, 39 Ga. App. 600, 148 S. E. 16.

§ 4012. (§ 3436.) May continue business of deceased.

The term, "current year," as used in this section, refers to the calendar year, and not to an arbitrary business year fixed by local custom or otherwise. *Clark v. Tennessee Chemical Co.*, 167 Ga. 248, 145 S. E. 73, quoting *King v. Johnson*, 96 Ga. 497, 23 S. E. 500.

Liability of Administrator for Failure to Rent Land.—The administrator, having no duty of renting the lands, was not liable for a failure to rent them. Hence the court erred in charging the jury that the administrator was bound for the reasonable rental value of the lands for the period in controversy, viz., the years succeeding that in which the intestate died. *Lee v. Moore*, 37 Ga. App. 279, 139 S. E. 922, citing *Cross v. Johnson*, 82 Ga. 67, 8 S. E. 56.

SECTION 7

Of Administrator's Sale

§ 4029. (§ 3453.) Sale divests lien.

In *Stephens v. First National Bank*, 166 Ga. 380, 143 S. E. 386, it was held that the court erred in ordering the dismissal of the levy upon the ground that no legal levy could be made under the facts of the case. Distinguishing the case of *Herrington v. Tolbert*, 110 Ga. 528, 35 S. E. 687.

Cited in Middleton v. Westmoreland, 164 Ga. 324, 330, 138 S. E. 852.

§ 4033. (§ 3457.) Property held adversely.

Exception to General Rule.—Where an administratrix and her attorney knew that certain land was being held adversely to the estate and that the heir in possession had actually filed his claim thereto on the very day of the sale and just before the sale, and they concealed this fact, then such possession held adversely to the estate by a third person and his filing of a claim would constitute such fraud as would be relievable in equity, and would prevent the application of the doctrine of caveat emptor. *Dukes v. Bashlor*, 162 Ga. 403, 407, 134 S. E. 98.

SECTION 8

Of Distribution, Advancements, and Year's Support

§ 4041. (§ 3465.) Year's support of family.

I. EDITOR'S NOTE AND GENERAL CONSIDERATIONS.

Effect of Prior Deed to Defraud Creditors.—A deed made to defraud creditors, though void as to them, is good between the grantor and the grantee, and the former after executing such deed has no title to the property thereby conveyed; and thereafter the same can not be set apart as a year's support for his widow. *McDowell v. McMurria*, 107 Ga. 812, 33 S. E. 709; *Bank v. Powell*, 163 Ga. 291, 135 S. E. 922.

Right to Support Absolute.—The right to a support for the widow and minor children, provided for in this section is absolute (*Miller v. Miller*, 105 Ga. 305, 31 S. E. 186; *Goss v. Harris*, 117 Ga. 345, 43 S. E. 734), and vests in such widow and minor child or children "upon the death" of

the husband. (*Brown v. Joiner*, 77 Ga. 232, 3 S. E. 157; *Swain v. Stewart*, 98 Ga. 366, 25 S. E. 831; *Anders v. First Nat. Bank*, 165 Ga. 682, 143 S. E. 98.

II. PRIORITY OVER OTHER CLAIMS.

Antecedent Debts.—Where the widow incurs debts for the support of herself and the minor children before or after a statutory year's support is set apart for them, some of the debts being for merchandise and the like purchased for the family, and some for money borrowed to operate a farm for support of the family, although the farm does not afford a support to the family, and although some of the debts have been created prior to the setting apart of the year's support, if the widow, after the setting apart of the year's support for herself and the minor children, execute security deeds conveying the land so set apart as security for the debts, such conveyance will be within her power and binding upon her and the children. The case differs from *Hill v. Van-Duzer*, 111 Ga. 867, 36 S. E. 966, and similar cases in which the antecedent debt was not created for the support of the widow and minor children. *Anders v. First Nat. Bank*, 165 Ga. 682, 142 S. E. 98.

The widow may incur, for support of herself and minor children of her deceased husband, a debt that will be enforceable against property set apart from the husband's estate as a year's support.

(a) As the right of the widow and minor children to a year's support to be set apart from the estate becomes absolute and vested upon the death of the husband and father, the widow may, after the death of husband and prior to the setting apart of the year's support for them, incur a debt for support of herself and the minor children, and the debt so incurred will be enforceable against property subsequently set apart for their support from the estate of the decedent.

(b) So far as incurring a debt for the support of the widow and minor children is concerned there is no ground for difference between incurring the debt before the year's support is set apart and after it is set apart. The necessity therefor may be as urgent in the one case as in the other. *Anders v. First Nat. Bank*, 165 Ga. 682, 142 S. E. 98.

Such a debt may be incurred by the widow in a farming or other enterprise, where the enterprise is carried on for the support of the widow and minor children (*Sexton v. Burruss*, 144 Ga. 192, 86 S. E. 537; *Phillips v. Cook*, 158 Ga. 151, 123 S. E. 108; *Patterson v. Swift*, 163 Ga. 297, 2, 136 S. E. 68); and whether or not the enterprise was a failure. *Jones v. Wilkes*, 146 Ga. 803, 92 S. E. 517; *Anders v. First Nat. Bank*, 165 Ga. 682, 142 S. E. 98.

III. TO WHOM ALLOWED.

In General.—Under this law, if there are no minor children, the widow may obtain a year's support for herself. If there are minor children, it is for their benefit as well as hers. There is nothing in the law which excludes her from taking a child's part if she has a year's support assigned to her. *Federal Land Bank v. Henson*, 165 Ga. 857, 144 S. E. 728, citing *Cole v. Cole*, 135 Ga. 19, 21, 68 S. E. 784.

IV. METHOD AND PROCEDURE.

Time of Application.—This section does not provide a limit of time after the death of the husband within which an application for year's support shall be made. Consequently mere lapse of time will not, as matter of law, bar the right to apply for the statutory year's support. *Federal Land Bank v. Henson*, 166 Ga. 857, 144 S. E. 728.

But long lapse of time between the death of the husband and the widow's application for year's support may be considered by the ordinary in connection with other facts tending to show that the widow had received a support from the estate or had waived it expressly or impliedly. And in passing upon the application the ordinary should give weight to evidence as to such facts in determining the amount to be granted, or whether the application should be wholly refused. *Federal Land Bank v. Henson*, 166 Ga. 857, 144 S. E. 728, citing *Riddle v. Shoupe*, 147 Ga. 387, 94 S. E. 336, and cit.; *Blossingame v. Rose*, 34 Ga. 418; *Wells v. Wilder*, 36 Ga. 194.

VI. NATURE AND AMOUNT OF PROPERTY.

Kind of Property Assignable.—The year's support provided for under this section must be set apart "from the estate" of the deceased husband or father. *Summerford v. Gilbert*, 37 Ga. 59; *Bank v. Powell*, 163 Ga. 291, 135 S. E. 922.

§ 4042. (§ 3466.) Support continued, when.

Where Executor Has Made Advances.—Where a widow

consumed property of the estate of her deceased husband as a support and accepted advances from the executor for that purpose, and where these transactions occurred prior to the grant of a first year's support and might have been pleaded in defense thereto, they can not be shown in defense to an application by her for a second year's support. *Hill v. Hill*, 36 Ga. App. 327, 136 S. E. 480, citing *Fulghum v. Fulghum*, 111 Ga. 635, 36 S. E. 602, 37 S. E. 774; *Wood v. Brown*, 121 Ga. 471, 49 S. E. 295.

Pending Litigation.—Where an estate being administered under a will is kept together for a longer period than twelve months by a suit of the executor for the construction of the will (*Hill v. Hill*, 161 Ga. 356, 130 S. E. 575), and not by any fault of the testator's widow, the widow, if there are no debts, will ordinarily be entitled to support from the estate for each year that it is thus kept together. *Hill v. Hill*, 36 Ga. App. 327, 136 S. E. 480.

§ 4043. (§ 3467). Return of appraisers.

Editor's Note—Effect of 1918 Amendment.—The provision of the act of 1918, amendatory of this section that the appraisers appointed to set apart a year's support shall make a full and accurate description of the land so set apart, does not make the provision for "a careful plat" mandatory where a plat is not essential to a full and accurate description. For this reason the provision for a plat is merely directory in its nature, and substantial compliance with the requirement as a whole may be effected by a complete and accurate description. *Willcox v. Beechwood Bank Mill Co.*, 166 Ga. 367, 143 S. E. 405; *Mitchell v. Lagrange Banking & Trust Co.*, 166 Ga. 675, 678, 144 S. E. 267.

Execution.—In *Rove v. Liveoak*, 38 Ga. App. 405, 407, 144 S. E. 45, it is said: "The year's support being in money, and presumably having been made the judgment of the court (provided this was necessary—see *Cowan v. Corbett*, 68 Ga. 66; Civil Code (1910), § 4043, the widow could have enforced the same by execution against the defendant as administrator."

§ 4052. (§ 3474.) Advancements.

Advancements Claimed Only in Cases of Intestacy.—In this State it is only in cases of intestacy that parties can claim advancements or be compelled to account for them. *Robinson v. Ramsey*, 161 Ga. 1, 4, 129 S. E. 837, citing *Huggins v. Huggins*, 71 Ga. 66.

Advancements Distinguished from Debts.—An advancement differs from a debt in that there is no enforceable liability on the part of the child to repay during the lifetime of the donor or after his death, except in the way of suffering a deduction in his portion of the estate. *Robinson v. Ramsey*, 161 Ga. 1, 6, 129 S. E. 837.

Same—Example.—In a will the term used by the testator, that each of certain children "owes the estate" a named sum of money, without any direction that this debt shall be treated as an advancement, fixes the status of the transaction as one of debts, and "debt" is not synonymous with "advancement." *Robinson v. Ramsey*, 161 Ga. 1, 129 S. E. 837.

Charge.—It was held no error in refusing to include this section in charge to jury, under the facts in *Home Mixture Guano Co. v. McKeone*, 168 Ga. 317, 147 S. E. 711.

SECTION 9

Of Commissions and Extra Compensation, and Expense of Giving Bond

§ 4067. (§ 3489.) Extra compensation.

Executor Must Show Nature of Services.—Where an executor claims compensation for extra services, the nature, character, extent, and value of such services must be satisfactorily proved by him; and in the absence of such showing, the refusal of the lower court to approve an exception to the auditor's finding of fact that the executor rendered no extra services will not be reversed where it appears that another finding of the auditor allows the executor compensation for all extra services so proved by the evidence. *Clements v. Fletcher*, 161 Ga. 21, 129 S. E. 846.

Order Presumably Valid.—The order of the ordinary, although not conclusive on the parties in interest, furnishes at least prima facie evidence that the executor was entitled to the amount. *Clements v. Fletcher*, 161 Ga. 21, 47, 129 S. E. 846.

§ 4069. (§ 3491.) Forfeiture of commissions.

In General.—It can not be said as a matter of law that an executor forfeits all compensation by reason of his neglect or misconduct in the administration of an estate. Under the evidence and facts of the case, it was a question of fact to be determined in the first instance by the auditor, and in the second instance upon exception to such finding by the judge. *Clements v. Fletcher*, 161 Ga. 21, 51, 129 S. E. 846, citing *Adair v. St. Amand*, 136 Ga. 1, 70 S. E. 578.

Relief from Forfeit—When Will Provides Compensation.—Where the will provided for reasonable compensation to the executor instead of commissions, the order of the ordinary would relieve the executor from forfeiture of such compensation by reason of such failure to make returns. *Clements v. Fletcher*, 161 Ga. 21, 129 S. E. 846.

SECTION 10

Of Final Settlements and Receipts

§ 4073. (§ 3493.) Settlement before ordinary.

Cited in *Coleman v. Hodges*, 166 Ga. 288, 290, 142 S. E. 875.

§ 4075. (§ 3495.) Settlement in court of equity.

In General.—The courts of equity have concurrent jurisdiction with the courts of ordinary over the settlement of accounts of administrators (*Clements v. Fletcher*, 154 Ga. 386, 114 S. E. 637), and in the administration of estates of deceased persons, in all cases where equitable interference is necessary or proper to the full protection of the rights of the parties at interest. *Morrison v. McFarland*, 147 Ga. 465, 94 S. E. 569; *Davis v. Culpepper*, 167 Ga. 637, 146 S. E. 319.

§ 4077. (3497.) Basis of settlement.

This being a suit on a guardian's bond, and it appearing that the guardianship began on February 3, 1919, the plaintiff's recovery should have included interest from the expiration of one year as to all items received by the guardian in the meantime. As to the one item received by the guardian after one year, interest should have been charged from the date when the same was received. *Fidelity, etc., Co. v. Norwood*, 38 Ga. App. 534, 144 S. E. 387.

SECTION 16

Of Foreign Administrators

§ 4105. Transfer of stock, etc.—Such foreign executor or administrator or foreign guardian may transfer the stock of any bank or other corporation in this State standing in the name of the decedent or ward, and check for deposits made by him and dividends declared on his stock, filing with the bank or corporation a certified copy of his appointment and qualification. Acts 1929, p. 169, § 1.

CHAPTER 4

Of Title by Contract

ARTICLE 1

Of Private Sales

§ 4106. (§ 3526.) Essentials of a sale.

Consent of Parties—Double Agency.—In a suit in trover,

it indisputably appearing that when the property sued for was turned over by the agent of the plaintiff to himself as the agent of the defendant it was without the knowledge or consent of either principal, and with no further purpose or intent than that the principals might thereafter agree upon a sale and the terms of a sale as between themselves, the transaction did not meet the requirements of a sale. *Willingham Stone Co. v. Whitestone Marble Co.*, 36 Ga. App. 230, 136 S. E. 180.

Completed Sale.—See *Hatchett v. State*, 34 Ga. App. 134, 128 S. E. 687, affirming the second paragraph under this catchline in the Georgia Code of 1926.

§ 4112. (§ 3532). Duress or fraud voids sale.

See notes to § 4255.

§ 4113. (§ 3533). What is fraud.

See notes to § 4305.

Misrepresentation.—In the forum of conscience a misrepresentation of the first kind mentioned in this section is of deeper dye than one of the latter kind; but in the forum of law both constitute fraud, the former positive fraud, and the latter legal fraud. *Gibson v. Alford*, 161 Ga. 672, 683, 132 S. E. 442.

Cited in *Olive v. McCoy*, 166 Ga. 113, 114, 142 S. E. 538. See notes to § 4255.

A servant being free to accept or reject employment, and knowing as well as the master of the dangers incident thereto, the fact that he was required to carry the pistol in order to continue in the service did not amount to duress, nor to a wilful or wanton disregard of the servant's safety. *Newman v. Griffin Foundry, etc., Co.*, 38 Ga. App. 518, 144 S. E. 386.

Applied in *Daniel Brothers Company v. Richardson*, 39 Ga. App. 212, 146 S. E. 505.

§ 4117. (§ 3537). Possibility can not be sold.

Futures.—See catchline "Cotton Futures" under section 4256.

§ 4119. (§ 3539). Agent in possession and with apparent right to sell.

Where the person to whom the property is delivered is given, by the person from whom he received it, only its mere possession, and is given no indicia of the right to sell or dispose of the property, which, "according to the custom of trade or the common understanding of the world," usually accompanies the authority to sell or dispose of the property, he can not by a sale to an innocent purchaser divest the true owner's title. *Chafin v. Cox*, 39 Ga. App. 301, 147 S. E. 154.

Illustrations.—See *Pilcher v. Enterprise Mfg. Co.*, 36 Ga. App. 760, 138 S. E. 272, holding substantially the same as the second paragraph under this catchline in the Georgia Code of 1926.

§ 4120. (§ 3540). Purchaser without notice, protected.

Purchaser from Fraudulent Grantee.—Where property was conveyed to defraud creditors and the grantee sold to a bona fide purchaser, the latter is protected under this section and section 4535 although the grantee is not a "vendee" as the word is used in this section. *Bank v. Wheeler*, 162 Ga. 635, 134 S. E. 753.

Quoted in *Pilcher v. Enterprise Mfg. Co.*, 36 Ga. App. 760, 138 S. E. 272.

§ 4122. (§ 3542). Deficiency in sale of lands.

III. SALE BY TRACT OR ENTIRE BODY.

Number of Acres Descriptive Merely.—See *Holliday v. Ashford*, 163 Ga. 505, 136 S. E. 524, holding substantially the same as the paragraph under this catchline in the Georgia Code of 1926.

§ 4124. (§ 3544). Purchaser losing land, rights of.

Quoted in *Holliday v. Ashford*, 163 Ga. 505, 136 S. E. 524.

§ 4125. (§ 3545.) Delivery of goods essential.

III. CONSTRUCTIVE DELIVERY.

B. Delivery of Bill of Lading and Warehouse Receipts.

Warehouse Receipts.—See *Continental Trust Co. v. Bank*, 162 Ga. 758, 134 S. E. 775, quoting the second paragraph under this catchline in the Georgia Code of 1926.

Applied in *Clark v. Wood*, 39 Ga. App. 340, 147 S. E. 173.

§ 4126. (§ 3546). Title in certain articles not to pass until paid for.

Applied in *Manget v. National City Bank*, 168 Ga. 376, 882, 149 S. E. 213.

§ 4128. (§ 3548). Consideration.

Applied.—Construing together the terms of a contract for sale of cotton to be produced and delivered in the future, the buying association was not allowed a discretion as to whether it would deduct the cost of handling, grading, and marketing. Pursuing the plan specified, the contract price was ascertainable, in view of this section. *Brown v. Georgia Cotton Ass'n*, 164 Ga. 712, 139 S. E. 417.

§ 4130. (§ 3550.) Purchase-price, when due.

Cash Sale Presumed.—See *Freeman v. Stedham*, 34 Ga. App. 143, 128 S. E. 702, affirming the first sentence in this paragraph under the same catchline in the Georgia Code of 1926.

§ 4131. (§ 3551.) Remedy of seller on default of buyer.

I. GENERAL CONSIDERATION.

Section Not Exhaustive of Remedies.—The remedies provided by this section, are not exhaustive, nor is the seller in every such case limited to one of the measures of damage stated in this section. (*Carolina Cement Co. v. Columbia Improvement Co.*, 3 Ga. App. 483, 60 S. E. 279; *United Roofing Co. v. Albany Mill Supply Co.*, 18 Ga. App. 185, 89 S. E. 177). *Morrison v. Finkovitch Inc.*, 37 Ga. App. 57, 138 S. E. 917.

Action on Open Account.—A suit "on open account" can not by amendment be changed into a suit under this section. *Butler v. Crown Cork, etc., Co.*, 34 Ga. App. 28, 128 S. E. 15.

Objection as to Time of Shipment.—In a suit brought by the seller after he has sold the goods for the buyer under this section the buyer will not be heard then to raise for the first time the issue that the shipment was not made in strict compliance with the contract as to time. *Cobb Lumber Co. v. Sunny South Grain Co.*, 36 Ga. App. 140, 135 S. E. 759.

Cited in *Abercrombie v. Georgia Distributing Co.*, 39 Ga. App. 654, 148 S. E. 296.

IV. STORING GOODS FOR VENDEE.

Waiver.—Where a purchaser notifies the seller to cancel the order, but the seller, refusing to accept such tender of breach, thereafter delivers the goods to a carrier, and the purchaser, after their arrival, refuses acceptance, and the seller proceeds to store them for the purchaser and brings suit on the contract for the purchase price, such a mere ineffective tender of delivery on the part of the seller would not amount to a waiver on his part of his right to such a procedure under this section, but he is still entitled to sue not on open account for goods sold and delivered, but upon the contract for the purchase price of the goods thus retained by the purchaser. *Edison v. Plant Bros. & Co.*, 35 Ga. App. 683, 134 S. E. 627.

§ 4135. (§ 3555.) Implied warranty.

I. GENERAL CONSIDERATION AND WARRANTY OF TITLE.

Stipulation against Parol Alteration.—Because a written contract of sale stipulates that it covers all the agreements between the purchaser and seller, and that it can not be altered or modified in any manner except by agreement in writing of its officers, such stipulation does not prevent the purchaser from setting up the implied warranty of the law. *Colt Co. v. Bridges*, 162 Ga. 154, 132 S. E. 889.

III. EXPRESS WARRANTY AS EFFECTING IMPLIED WARRANTY.

Express Warranty Excludes Implied One—Scope of Express Warranty Important.—An express warranty may or may

not exclude the implied warranty which the law attaches to all contracts of sale, the exclusion of this implied warranty being dependent upon the scope and terms of the express warranty. *Colt Co. v. Bridges*, 162 Ga. 154, 132 S. E. 889.

Where by private agreement the parties seek to take the law in their own hands, they are at liberty to do so, and the general rule is that an expressed warranty excludes the implied warranty, but only to the extent that the expressed warranty deals with matters which would have been covered by the implied warranty, and should not be construed to exclude the implied warranty as to matters with which it does not deal, and with which it does not conflict. *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 464, 144 S. E. 327.

Exclusion Not in Every Feature of Contract.—See *Colt Co. v. Bridges*, 162 Ga. 154, 132 S. E. 889, affirming the holding of the first paragraph of this section in the Georgia Code of 1926.

§ 4136. (§ 3556.) Effect of breach.

I. GENERAL CONSIDERATIONS.

Partial Failure of Consideration.—An action for damages for a breach of the implied warranty under subsection 2, section 4135 lies where there is a partial failure of consideration. *Boone v. Lewis*, 35 Ga. App. 478, 133 S. E. 653.

Applied in sale of an automobile in *Wade v. Georgia Motor Sales*, 38 Ga. App. 665, 145 S. E. 111.

III. DAMAGES.

Measure of Damages.—The measure of damages is the difference between the price paid for the goods and their actual value as reduced by their defective condition. *Boone v. Lewis*, 35 Ga. App. 478, 133 S. E. 653.

See *Colt Co. v. Mallory*, 35 Ga. App. 289, 133 S. E. 55, affirming the holding of the first sentence in paragraph 4 under this catchline in the Georgia Code of 1926.

Same—Travelling Expenses.—Expense properly and reasonably incurred by the plaintiff in travelling in order to lessen the loss was a proper item of damages. *Boone v. Lewis*, 35 Ga. App. 478, 133 S. E. 653.

Same—Testimony of Vendee as to Value of Goods.—Where a defendant testified that goods were of no value to him in the condition they were in, this did not show that they were not of some value. *Colt Co. v. Mallory*, 35 Ga. App. 289, 291, 133 S. E. 55.

§ 4137. (§ 3557.) Acceptance, presumption of quality.

Section Applies to Express Warranty Only.—This section relates to cases of express warranty (*Cook v. Finch*, 117 Ga. 541, 544, 44 S. E. 95), and the warranty in the instant case was an implied one. *Puffer Mfg. Co. v. Nunn*, 37 Ga. App. 358, 140 S. E. 395.

§ 4144. (§ 3564.) Essentials of gift.

Present Intention.—See *Clark v. Bridges*, 163 Ga. 542, 136 S. E. 444, quoting the sentence in the paragraph under the same catchline in the Georgia Code of 1926.

Transfer of Stock.—Under sections 4144-4147, transfer of stock to educational institution, without delivery of certificates, did not constitute a gift; transfer being only prima facie evidence of delivery. *Southern Industrial Inst. v. Marsh*, 15 Fed. (2d), 347.

§ 4146. (§ 3566.) Effect of written deed.

Applied in *Cook v. Flanders*, 164 Ga. 279, 291, 138 S. E. 218.

§ 4147. (§ 3567.) Delivery.

Delivery between Members of Same Family.—The rule as to delivery is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as delivery acts which would not be so regarded if the transaction were between strangers living in different places. *Harrell v. Nicholson*, 119 Ga. 458, 460, 46 S. E. 623; *Williams v. McElroy*, 35 Ga. App. 420, 133 S. E. 297.

Deposit Subject to Checking Account.—A deposit made in a bank by a parent for the benefit of a child but subject to be drawn out at any time by either is not a gift under this and the other sections of this chapter. *Clark v. Bridges*, 163 Ga. 542, 136 S. E. 444.

Renunciation of Dominion—Question for Jury.—Where a husband as donor had parted absolutely with his title in favor of his wife, and the subject-matter of the gift (certain promissory notes) remained in a box to which the wife carried the key, but which contained articles belonging to each, and to which each continued to have the right of access, it became a question of fact for the jury to determine whether, under the circumstances, the donor had in fact relinquished control by the gift. *Williams v. McElroy*, 35 Ga. App. 420, 133 S. E. 297.

§ 4149. (§ 3569.) Gifts void against creditors, etc.

Cited in *Davenport v. Wood*, 166 Ga. 365, 366, 143 S. E. 398.

§ 4150. (§ 3570.) Presumption of gifts [of personal property].

Question for Jury.—*Gross v. Higginbotham*, 34 Ga. App. 549, 130 S. E. 371, affirms the holding under this catchline in the Georgia Code of 1926.

§ 4153. (§ 3573.) Gifts for illegal purposes.

Applied in *Hollomon v. Board of Education*, 168 Ga. 359, 364, 147 S. E. 882.

§ 4154. (§ 3574.) Donatio causa mortis.

Essentials.—Under this section, a gift causa mortis must be intended to be absolute only in the event of death. *Southern Industrial Inst. v. Marsh*, 15 Fed. (2d), 347.

CHAPTER 5

Of Title by Escheat and Forfeiture

§ 4155. (§ 3575.) Escheat.

Interest of State.—Where it is alleged that a deceased left no heirs and that the will made by him was false and fraudulent it was held that the State had sufficient interest in the property to file a petition demanding probate of the will and to caveat the probate since otherwise the State would have no way of declaring the property escheated. *Oslin v. State*, 161 Ga. 967, 132 S. E. 542. The dissenting opinion to this case by Russell, C. J., contains a discussion of the history of escheats.—Ed. Note.

CHAPTER 6

Of Title by Prescription

§ 4164. (§ 3584.) Adverse possession.

When Possession Adverse.—Where a vendor sold property to his wife and continued in possession without making her a deed thereto as he promised, he does not hold adversely to her. *McArthur v. Ryals*, 162 Ga. 413, 134 S. E. 76.

In defining the adverse possession which may be the foundation of a prescriptive title, it is best to state the necessary elements of such possession as they are stated in this section of the Civil Code. *Smith v. Board of Education*, 168 Ga. 755, 149 S. E. 136.

§ 4166. (§ 3586.) Constructive possession.

Applied in *Dinsmore v. Holcomb*, 167 Ga. 20, 144 S. E. 780.

§ 4167. (§ 3587.) Possession extends to what bounds.

Meaning of "Contiguous."—The word "contiguous," as used in this section means to touch. *Standard Dictionary*; *Web-*

ster's New International Dictionary. Accordingly, tracts of land which corner with one another are contiguous. *Morris v. Gibson*, 35 Ga. App. 689, 134 S. E. 796.

When One Deed Conveys Several Tracts.—The same deed may make independent conveyances of two or more separate and non-contiguous tracts of land. In such a case actual possession of one or more of such distinct entities as thus conveyed will not be extended by construction to include them all. But where the several tracts designated as being included by the terms of the conveyance actually adjoin or corner, so as to in fact constitute a single parcel, actual possession of a portion of the premises thus conveyed will be extended by construction to include the entire premises. *Morris v. Gibson*, 35 Ga. App. 689, 134 S. E. 796.

§ 4168. (§ 3588.) Possession for twenty years gives title.

Other Titles Extinguished.—"When an adverse possessor has held for the requisite period and his prescriptive title ripens, it extinguishes all other inconsistent titles and itself becomes the true title." *Powell on Actions for Land*, 459, sec. 349. *Danielly v. Lowe*, 161 Ga. 279, 130 S. E. 687.

None of these disabilities existed under the facts of this case. *Brewton v. Brewton*, 167 Ga. 633, 634, 146 S. E. 444.

§ 4169. (§ 3589.) Possession for seven years gives title, when.

Giving Section in Charge Held Harmless.—Although that part of this section as to the title by prescription, which relates to forged or fraudulent deeds was not applicable to the case on trial, the giving of that section in charge to the jury could not have harmed the plaintiff and was not cause for a new trial. *Butler v. Lovelace-Eubanks Lumber Co.*, 37 Ga. App. 74, 139 S. E. 83.

§ 4171. (§ 3591.) Dedication to public use.

Title Shown in Testator.—Even if under the language of this section there had been a dedication by the plaintiffs' testator in his lifetime of the lot of land in controversy for public uses, this would not prevent the plaintiffs from maintaining the suit to recover the land, if they show title in the estate of the testator. *Smith v. Lemon*, 166 Ga. 93, 97, 142 S. E. 554.

§ 4175. (§ 3595.) Other exceptions.

Period of Non-Representation—No Deduction after Five Years.—"If the estate remains unrepresented for more than five years, no deduction at all from the adverse possessor's term will be allowed in favor of the personal representative." *Powell's Actions for Land*, 448. *Danielly v. Lowe*, 161 Ga. 279, 130 S. E. 687.

§ 4177. (§ 3597.) Fraud to prevent prescription.

Actual fraud can not be founded on presumptive notice, on that sort of notice which is based upon record, or which is presumed from want of diligence. *Garrett v. Adrain*, 44 Ga. 274, 276, quoted and approved in *Baxter v. Phillips*, 150 Ga. 498, 500, 104 S. E. 196; *Mohr & Sons v. Dubberly*, 165 Ga. 309, 312, 140 S. E. 856.

CHAPTER 7

Of Conveyances of Titles

ARTICLE 1

Generally

§ 4179. (§ 3599.) Requisites of a deed.

Consideration—Inquiry into—When Permissible.—See *Sikes v. Sikes*, 162 Ga. 302, 133 S. E. 239, affirming the holding in

the first paragraph under this catchline in the Georgia Code of 1926.

Requirement for Seal.—A seal is not an essential requisite to a deed. *Atlanta, Knoxville, etc., Ry. Co. v. McKinney*, 124 Ga. 929, (5), 53 S. E. 701; *Patterson v. Burns*, 150 Ga. 198, 103 S. E. 241; *Bank of Manchester v. Birmingham Trust etc., Co.*, 156 Ga. 486, 119 S. E. 603; *Citizens Bank v. Farr*, 164 Ga. 880, 139 S. E. 658.

Consideration — Love and Affection.—Where a grantor executes and delivers to the father of an infant of tender years, in consideration of love and affection, a deed conveying to the infant son of the father title to a described tract of land, delivery to the father and his possession of the deed is evidence of delivery to the infant. *Montgomery v. Reeves*, 167 Ga. 623, 146 S. E. 311.

§ 4180. (§ 3600.) Grantee bound by conditions in deed.

Applied in *Phillips v. Blackwell*, 164 Ga. 856, 139 S. E. 547; *Peebles v. Perkins*, 165 Ga. 159, 140 S. E. 360; *Renfro v. Alden*, 164 Ga. 77, 137 S. E. 831.

§ 4182. (§ 3602.) Form of deed.

Form sufficient in *Crider v. Woodward*, 162 Ga. 743, 135 S. E. 95; *Citizens & Southern Bank v. Farr*, 164 Ga. 880, 139 S. E. 658.

Intention to Transfer Must Appear.—This provision does not dispense with the necessity of using language indicating an intention of the maker to convey a present estate in specific land to a named grantee. *Caldwell v. Caldwell*, 140 Ga. 736, 737, 79 S. E. 853; *Tyson v. Hutchinson*, 164 Ga. 661, 663, 139 S. E. 519.

§ 4184. (§ 3604.) Deed of an infant.

See notes to § 4233.

§ 4187. (§ 3607.) Inconsistent clauses in deed.

In General.—The holding of *Thompson v. Hill*, 137 Ga. 308, 73 S. E. 640, as set out under this catchline in the Georgia Code of 1926, is affirmed in *Clark v. Robinson*, 162 Ga. 395, 134 S. E. 72, and *Holder v. Jordan Realty Co.*, 163 Ga. 645, 136 S. E. 907.

§ 4188. (§ 3608.) Recitals do not estop.

See notes to § 5795.

§ 4190. (§ 3610.) Ancient deed.

Jury to Pass on Genuineness.—Where such a deed as described in this section is apparently genuine, has come from the proper custody, and is shown not to be inconsistent with possession, or if other corroboration appears, it should be admitted in evidence as prima facie established. But the jury has the right to finally pass on its genuineness, after hearing all the testimony pro and con. *Gaskins v. Guthrie*, 162 Ga. 103, 132 S. E. 764.

ARTICLE 2

Covenants and Warranty

§ 4195. (§ 3615.) General warranty of land covers known defect.

In *Lifsey v. Finn*, 38 Ga. App. 671, 674, 145 S. E. 519, it is said: "It must indeed be a strong case to authorize a court to say that a warranty deed does not warrant the title to the property conveyed."

Applied in *Lifsey v. Finn*, 38 Ga. App. 671, 672, 145 S. E. 519.

ARTICLE 3

Of Registration

§ 4198. (§ 3618.) Deeds, when and where recorded.

Applied in *Dorsey v. Clower*, 162 Ga. 299, 133 S. E. 249.

§ 4198(1). Method of recording instruments affecting land title. — All decrees, deeds, mortgages, or other instruments affecting the titles to lands in this State shall be recorded by the clerk upon good and substantial white paper, in either printing, typewriting, or handwriting in ink, which record shall be clear, legible, and permanent, but any record may be in any one or all of said methods. Acts 1929, p. 321, § 1.

§ 4203. (§ 3821.) If attested out of this state.

Injunction.—Upon hearing this case the judge refused an injunction upon the condition that the defendants should comply with the order of the judge contained therein, to the effect that defendants, administrators upon the estate of an intestate, have a deed to the tract of land in question “legally attested or acknowledged so as to entitle the same to record.” This order, as the court was authorized to hold upon a subsequent renewal of the application for injunction, was substantially complied with; and it was not error to refuse an injunction. *Hagan v. Hagan*, 165 Ga. 364, 141 S. E. 54.

§ 4205. (§ 3623.) Probate by witness.

Substantial Compliance.—Where a subscribing witness to a deed which is not officially attested at the time of its execution appears before an officer authorized to officially attest a deed, and on oath testifies to the execution and delivery of such deed according to law, and signs an affidavit setting forth such execution, and the certificate of such officer to the affidavit states that it was “sworn to before” him, but omits to certify that it was “subscribed” in his presence, the affidavit of probate is a sufficient compliance with the terms of this section. *Willie v. Hines-Yelton Lumber Co.*, 167 Ga. 883, 146 S. E. 901.

§ 4210. (§ 3628.) Deed evidence, when.

Does Not Refer to Instruments Forming Bases of Action.—The provisions of this section of the code really have application only in cases where a recorded deed is collaterally introduced in evidence, and do not refer to instruments forming the basis of the action. *Steiner v. Blair*, 38 Ga. App. 753, 755, 145 S. E. 471.

Under this section, when the alleged maker of a deed which is the basis of an action against him files an affidavit that the deed is a forgery, it is the duty of the court to arrest the case and require an issue to be made and tried as to the genuineness of the alleged instrument; but the court does not err in refusing to require such an issue to be made and in allowing the instrument to be admitted in evidence, where the defendant admits the genuineness of his signature, and where it appears, from his testimony, that the purpose of the affidavit is not to enable him to prove a material and fraudulent alteration of the instrument, subsequent to its execution, by the party claiming a benefit thereunder, but is merely to show that he was induced to sign the instrument without reading it, relying upon the good faith of the opposite party to incorporate therein the terms of the agreement previously arrived at. *Ford v. Serenado Mfg. Co.*, 27 Ga. App. 535(2), 109 S. E. 415; *Odum v. Cotton States Fertilizer Co.*, 38 Ga. App. 46, 142 S. E. 470.

Who May Attack.—Under this section, a deed, when offered, may be attacked by affidavit of forgery by the opposite party, whether plaintiff or defendant, and even by one who is not a party to the cause if he is the maker of the deed or an heir of the maker of the deed. *Steiner v. Blair*, 38 Ga. App. 753, 755, 145 S. E. 471.

Cited in *Burt v. Gooch*, 37 Ga. App. 301, 306, 139 S. E. 912.

§ 4212. (§ 3630.) Copy when evidence.

Proof of Inquiry as to Loss of Original Deed Requisite.—

In order to admit in evidence a certified copy of a registered deed, it must be shown that the original has been destroyed, or that it was lost or inaccessible, or that due diligence has been exercised in endeavoring by proper search and inquiry to ascertain in whose custody it is. *Beall v. Francis*, 163 Ga. 894, 896, 137 S. E. 251.

§ 4213. Bonds for title may be recorded.

The primary intent and purpose of the act was to give notice to all persons dealing with the obligor, from the date of the filing of the bond, “of the interest and equity of the holder of such bond in the property therein described, so that any one acquiring a lien on or title to the property after the filing of the bond would take the property subject to the interest and equity of the obligee in the bond.” (*Gleaton v. Wright*, 149 Ga. 220, 100 S. E. 72); *Fender v. Hodges*, 166 Ga. 727, 731, 144 S. E. 278.

Where one obtained and duly recorded a security deed in 1922, without notice of any kind of the existence of an unrecorded bond for title from his grantor to the same land dated in 1920, the former is entitled to priority in the distribution of the proceeds derived from the sale of such land. The same priority exists in favor of subsequent holders under duly recorded deeds as against a transferee of the bond, such transfer never having been recorded. *Fender v. Hodges*, 166 Ga. 727, 144 S. E. 278.

§ 4213(1). Record of bonds for title, etc.; priority over deeds, etc.

Supplements Section 4213.—This section approved August 12, 1921 (Ga. Laws 1921, p. 157), made further provision for recording bonds for title. It supplements the language of Code section 4213, and made plainer its meaning. *Fender v. Hodges*, 166 Ga. 727, 731, 144 S. E. 278.

A transfer of title held under the security deed, made to assign all interest in the debt secured as in the land as security therefor, stands on the same basis as to execution and recordation as the deed itself. *Citizens & Southern Bank v. Farr*, 164 Ga. 880, 139 S. E. 658; *Mortgage Guar. Co. v. Atlanta Commercial Bank*, 166 Ga. 412, 415, 143 S. E. 562.

§ 4215(1). Park's Code.

See § 4213(1).

CHAPTER 8

Land Registration

§ 4215(a). Park's Code.

See § 4215(1).

§ 4215(1). Name of law.

Cited in *Smith v. Board of Education*, 166 Ga. 535, 143 S. E. 578.

§ 4215(t). Park's Code.

See § 4215(20).

§ 4215(20). Powers of examiner; report; evidence; notice; exceptions; jury trial; continuance; verdict; procedure; new trials; recommittal.

Neglect of Exceptor to Set Out Evidence.—The neglect of a party excepting to an examiner's report on matters of fact, or on matters of law dependent for a decision upon the evidence, to set forth, in connection with each exception of law or fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is sufficient reason in a land-registration proceeding for dismissing or disapproving the exceptions of fact and for overruling or dismissing the exceptions of law. *Davis v. Varn Turpentine & Cattle Co.*, 167 Ga. 690, 146 S. E. 458.

The procedure on the report of the examiner under the land-registration act is the same as that on the report of an auditor in an equity case. *Bird v. South Ga. Industrial Co.*, 150 Ga. 421, 104 S. E. 232; *McCaw v. Nelson*, 168 Ga. 202, 147 S. E. 364.

EIGHTH TITLE

Of Contracts

CHAPTER 1

General Principles

§ 4219. (§ 3634.) Specialty.

An insurance policy under seal constituted a "specialty," under sections 4219, 4359, such that there could be no recovery of money paid under it, on ground of false representations, as long as it remained uncanceled, and suit to cancel and to recover such payment was not barred on ground that complainant had adequate and complete remedy at law. *Massachusetts Protective Ass'n v. Kittles*, 2 Fed. (2d), 211.

§ 4222. (§ 3637.) Essentials of a contract.

Subject Matter Not in Existence.—If a contract amounts to an executory agreement for a bona fide sale of property of a character such as under the circumstances and under the law can be legally made the subject matter of a sale, and is not merely speculative in character, the parties may be bound, although the subject matter of the sale has no existence at the time the agreement is entered upon, and the seller expects to comply with his contract by subsequently acquiring the property thus agreed to be conveyed. *Parks v. Washington, etc., R. Co.*, 35 Ga. App. 635, 133 S. E. 634. Citing *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 201, 37 S. E. 485, 81 Am. St. R. 28; *Jones v. Fuller*, 27 Ga. App. 84, 107 S. E. 544; *Gilbert v. Copeland*, 22 Ga. App. 753, 97 S. E. 251.

§ 4224. (§ 3639.) Conditions precedent and subsequent.

Example of Condition Subsequent.—Where the commissioners of a drainage district, enter into a collateral agreement with a contractor by the terms of which such commissioners agree "to be personally responsible for the money of the district until money can be secured by the issuing and sale of bonds of said district or until the district secures money from other sources," such collateral agreement is based upon a condition subsequent; and upon the fulfillment of the condition subsequent all liability under such agreement, ipso facto, ceases. *Board v. Williams*, 34 Ga. App. 731, 753, 131 S. E. 911.

Applied in *Hollomon v. Board of Education*, 168 Ga. 359, 364, 147 S. E. 882.

§ 4226. (§ 3641). Novation.

A note given for an existing indebtedness, even at a higher rate of interest and due at a later date, is not given for a new consideration, and therefore does not constitute a novation. *Brooks v. Jackins*, 38 Ga. App. 57, 142 S. E. 574.

§ 4227. (§ 3642). Mutual temporary disregard of contract.

In *Googe v. York*, 38 Ga. App. 62, 65, 142 S. E. 562, it is said: "While it is true that the plaintiff delivered the contract and permitted the defendant to take possession of the premises upon the payment of only a part of the rent, this was a mere voluntary indulgence and did not constitute a departure from the terms of the original contract in relation to the time for payment, within the meaning of section 4227 of the Civil Code."

Cited in *Stoddard v. Churchill Line*, 37 Ga. App. 347, 348, 140 S. E. 778.

§ 4230. (§ 3645.) Assent is essential to contract.

Mutual Assent—Bank and Depositor.—Where a bank delivered to a depositor, money, neither he nor the bank intending that it should be accepted by him in payment of the amount due to him, but with the expectation on the part of the bank that he should deliver the money to a third party, the depositor was not paid and the bank continued to be his debtor. *Davis v. Farmers, etc., Bank*, 36 Ga. App. 415, 419, 136 S. E. 816.

Unilateral Contracts.—An agreement by one of the parties to a controversy to accept a certain sum of money in settlement, without any promise by the other to pay it, does not render the latter liable therefor, although the agreement is in writing and signed by both of the parties. *Manget v. Carlton*, 34 Ga. App. 556, 130 S. E. 604.

Illustrations—Note Accompanying Application for Insurance Policy.—An application for a policy of insurance must be accepted within a reasonable time, or else it may be treated by the applicant as having been rejected. *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 128 S. E. 70.

Same—Same—Reasonable Time.—While the period constituting such a reasonable time may, as a general rule, be a matter for determination by the jury under all the evidence, yet where the insurance company appears to have remained silent for approximately six months after receipt of the application, the presumption that it was rejected becomes conclusive. *Home Ins. Co. v. Swan*, 34 Ga. App. 19, 128 S. E. 70.

Child not 10 years old, incapable of making gift of land; attempt to make, not subject of affirmance at majority. *Burt v. Gooch*, 37 Ga. App. 301, 305-6, 139 S. E. 912.

CHAPTER 2

Of the Parties

§ 4233. (§ 3648). Infant, when bound.

Ratification.—If the infant receives property or other valuable consideration, and after arrival at age retains possession of such property, or enjoys the proceeds of such valuable consideration, such ratification of the contract shall bind her. Civil Code (1910), § 4233. *Holbrook v. Montgomery*, 165 Ga. 514, 141 S. E. 408.

Time of Disaffirmance.—The infant may disaffirm the deed within a reasonable time after attaining majority; and if she fails to do so, the right of avoidance on the ground of infancy will be lost. What is a reasonable time will depend upon the facts of each case, but not be longer than seven years after the disability is removed. (*Nathans v. Arkwright*, 66 Ga. 179; *McGarrity v. Cook*, 154 Ga. 311, 114 S. E. 213); *Holbrook v. Montgomery*, 165 Ga. 514, 141 S. E. 408.

When the lapse of time after majority is not longer than seven years, what is a reasonable time for the disaffirmance by an infant of her deed is a question for the jury, under all the facts of the case. (*Brown v. Carmichael*, 152 Ga. 353, 110 S. E. 3); *Holbrook v. Montgomery*, 165 Ga. 514, 141 S. E. 408.

Restoration of Consideration Not a Condition Precedent.—While an infant should not be allowed to avoid her contract without making restitution of any money or property which she has received under the contract, yet she is not required to make restitution as a condition precedent to a disaffirmance, unless at the time of disaffirmance she has the fruits of the contract in her possession. If she can not restore, she is not required to do so. (*Shuford v. Alexander*, 74 Ga. 293; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788; *Gonackey v. General Accident etc., Corporation*, 6 Ga. App. 381, 65 S. E. 53); *Holbrook v. Montgomery*, 165 Ga. 514, 141 S. E. 408.

CHAPTER 3

Of the Consideration

§ 4241. (§ 3656.) Nudum pactum.

Time for Acceptance—Insurance Policy.—Where a person applies for a policy of insurance, accompany his applica-

tion with a note to cover the premium, yet no policy of insurance was ever delivered or tendered to him by or for the company and was a nudum pactum, the note was without any consideration to support it. *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 128 S. E. 70.

Cannot Constitute Basis of Damages.—Where an agreement was a nudum pactum, it constituted no legal basis for a claim of damages put forward as for a breach of contract. *Massell v. Fourth Nat. Bank*, 38 Ga. App. 601, 607, 144 S. E. 806.

An agreement between the superintendent of banks and the maker of a promissory note, to the effect that the superintendent will not enforce the stipulation in the note with reference to the payment of attorney's fees, is not binding where the agreement is entirely executory and is not supported by a valuable consideration and where no element of estoppel enters. *Ross v. Southern Exchange Bank*, 38 Ga. App. 532, 144 S. E. 338.

§ 4242. (§ 3657.) Valid consideration.

Concurrence of Benefit and Injury.—A consideration need not be a benefit accruing to the promisor. *Porter Fertilizer Co. v. Brewer*, 36 Ga. App. 329, 136 S. E. 477.

Past and Future Support.—A deed in consideration of one dollar actually paid, and of past support of the grantors by the grantees, and an agreement on the part of the grantees for the future support of the grantors, is not a voluntary conveyance, but one based upon a valuable consideration. *Dorsey v. Clower*, 162 Ga. 299, 131 S. E. 249.

Notes to Be Discounted by Debtor.—Consideration not wanting, where creditor executed notes payable to debtor, to be indorsed and discounted by the debtor, the proceeds to be applied to the debt, which was done. *LaGrange Lumber etc., Co. v. Farmers etc., Bank*, 37 Ga. App. 409(4), 140 S. E. 766.

Where A and B wish to buy the same property, and A has negotiated with the owner to the extent that the latter will not negotiate with B until the negotiations with A have terminated, a promissory note given by B to A in consideration of the withdrawal by A from further negotiations and the surrender to B of his right to purchase, is not without consideration, and therefore, according to its terms, is enforceable. *Owens v. Glover Grocery Company*, 39 Ga. App. 798, 148 S. E. 541.

§ 4243. (§ 3658.) Good and valuable considerations.

Caring for Parents.—See note Past and Future Support under section 4242.

§ 4246. (§ 3661.) Mutual promises.

Applied in *Jackson v. Forward Atlanta Commission Incorporated*, 39 Ga. App. 738, 148 S. E. 356.

§ 4248. (§ 3663.) Impossible consideration.

Applied in *LaGrange Lumber & Supply Co. v. Farmers & Traders Bank*, 37 Ga. App. 409, 140 S. E. 766.

§ 4250. (§ 3665.) Failure of consideration.

Notes—When Receipt of Consideration Acknowledged.—Where a promissory note has been made, acknowledging receipt of the consideration the receipt of part of consideration cannot be denied unless the admission and promise resulted from the mutual mistake of the parties or unless brought about by the mistake of one party knowingly taken advantage of by the other. *Spells v. Swift & Co.*, 34 Ga. App. 620, 130 S. E. 593, citing *Bonds v. Bonds*, 102 Ga. 163, 29 S. E. 218 and *Shelton & Co. v. Ellis*, 70 Ga. 297, 301.

CHAPTER 4

Of Illegal and Void Contracts

§ 4251. (§ 3666.) Void contracts.

Negotiable Instruments Given for Illegal Purpose.—See Editor's Note under section 4294(57).

§ 4252. (§ 3667.) Attorney's fees in notes.

See notes to § 5660.

II. GENERAL CONSIDERATIONS.

Need Not Be in Writing.—There is no law requiring that a promise to pay attorney's fees shall be in writing in order to be enforceable under this section. *Forsyth Mercantile Co. v. Williams*, 36 Ga. App. 130, 135 S. E. 755.

Waiver of Right.—See *Bank v. Farmers State Bank*, 35 Ga. App. 340, 133 S. E. 307, quoting the holding under this catchline in the Georgia Code of 1926.

Amount of Fees Collectible.—Where a note provided for 10 per cent attorney's fees the defendant can not lessen his liability by setting up the fact that plaintiff actually contracted with his attorney for a less sum. *Bank v. Farmers State Bank*, 35 Ga. App. 340, 133 S. E. 307.

Statutory Condition.—In providing that the contract is void until the statutory condition is complied with, the legislature did not contemplate the validation of a void contract, but merely added a statutory condition to the written contract to pay attorney's fees. *Security Mortgage Co. v. Powers*, 278 U. S. 149, 49 S. Ct. 84.

Where Debtor Insolvent.—The mere fact of the debtor's insolvency does not prohibit the rendering of a judgment for attorney's fees under this section. *Security Mortgage Co. v. Powers*, 278 U. S. 149, 49 S. Ct. 84, 87.

III. NOTICE.

A. In General.

The liability for attorney's fees in a promissory note, being in its nature a penalty upon the maker for the failure to pay the note by a specified time, the notice required under the statute and its service upon the defendant within the required time as a condition precedent to such liability must be established by evidence authorizing with some degree of certainty and without ambiguity the inference that the required notice was given, and was given within the required time. *Edenfield v. Youmans*, 38 Ga. App. 584, 144 S. E. 671.

The production of the notice for attorney's fees in response to a notice to produce is a circumstance which, when taken in connection with other testimony, is sufficient to authorize the inference that the defendant received the statutory notice for attorney's fees required by law. It appearing that the written notice for attorney's fees had been produced in court in response to a notice to produce served upon the defendant's counsel, and that therefore it had been in the possession, power, custody, or control of the defendant, it was properly admitted in evidence. *Edenfield v. Youmans*, 38 Ga. App. 584, 144 S. E. 671.

Cited in *Equitable Life etc., So. v. Pattillo*, 37 Ga. App. 398, 400, 140 S. E. 403.

B. Sufficiency of Notice.

Notice naming a term preceding the term to which the suit is finally made returnable will not suffice. *Russell v. Life Ins. Co.*, 134 Ga. App. 640, 130 S. E. 689.

IV. THE RETURN DAY, PAYMENT AND FILING SUIT.

Under the Federal equity rule 12, which requires the clerk of a federal court on the filing of a bill to issue subpoena, returnable 20 days from the issuing thereof, such day is "return day" of such bill, within the meaning of this section. *Perry v. Hancock Mut. Life Ins. Co.*, 2 Fed. (2d), 250.

V. TRIAL.

B. Evidence.

Necessity of Proof—Implied Where Case in Default.—See *State Mut. Life Ins. Co. v. Jacobs*, 36 Ga. App. 731, 137 S. E. 905; affirming the holding given under this catchline in the Georgia Code of 1926.

§ 4253. (§ 3668.) Contracts against public policy.

II. RESTRAINT OF TRADE.

Agreement without Limitation.—A covenant or mutual agreement, on sale of all the equipment owned in the operation of a barber-shop in a town, with the good will of that business, that, as a part of the trade and an inducement to buy, the seller would not thereafter again operate a barber-shop in that town, construed as meaning that the seller stipulated not to engage in his occupation as a barber in that town under all circumstances at any time

in the future, was unreasonable and void. *Brown v. Williams*, 166 Ga. 804, 140 S. E. 256.

§ 4254. (§ 3669). Fraud.

See notes to § 4712.

Cause of action to rescind contract to buy land, induced by false representations, stated in *Coral Gables Corporation v. Hamilton*, 168 Ga. 193, 147 S. E. 494.

§ 4255. (§ 3670). Duress.

Allegations Held Insufficient.—In a petition seeking cancellation of certain contracts and conveyances on the ground that they were obtained by duress, the allegations relied on to show duress were insufficient, and were specially demurrable. *Keller v. Levison*, 165 Ga. 178, 140 S. E. 493.

§ 4256. (§ 3671.) Gaming contracts.

Cotton Futures.—A cotton futures contract, though it is condemned by section 4258, as unlawful, is not a gaming contract in the sense and meaning of this section, and the money paid upon such consideration may not be recovered back. *Lasseter v. O'Neill*, 162 Ga. 826, 135 S. E. 78. The history of these sections is thoroughly discussed in the opinion to this case. It should be noted that this decision practically overrules the cases cited under this catchline in the Georgia Code of 1926. The dissenting opinion of Hines, J., is based upon this and other considerations. Ed. Note.

§§ 4257-4264. Repealed by Acts of 1929, p. 245, § 8. See § 4264(8).

See note "Cotton Futures" under preceding section.

In General.—In general a state Legislature may prescribe rules of evidence and may create presumptions of the existence of a fact or fault from given facts, if there is really some connection between them in reason or experience, provided there is a fair opportunity for rebuttal allowed; but it may not enact that facts which it could not declare to be a crime, shall be sufficient, though only prima facie, evidence of one. This statute belongs to the former class, but even if such provisions are invalid they do not invalidate the body of the act. *Fenner v. Boykin*, 3 Fed. (2d), 674, affirmed in 271 U. S. 240, 46 S. Ct. 492.

Within Police Power of State.—A state statute prohibiting contracts for future delivery in all cases where margins are deposited is not unconstitutional as a deprivation of liberty or property without due process of law, but is within the police power of the state. *Fenner v. Boykin*, 3 Fed. (2d), 674, affirmed in 271 U. S. 240, 46 S. Ct. 492.

Does Not Conflict with Interstate Commerce Clause of Constitution.—These sections do not conflict with article 1, section 8, paragraph 3, of the constitution of the United States (Civil Code of 1910, § 6644), by which the States delegated exclusive power to the United States "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (*Alexander v. State*, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859; *Arthur v. State*, 146 Ga. 827, 92 S. E. 637; *Fenner v. Boykin*, 3 F. (2d) 674; *Fenner v. Boykin*, 271 U. S. 240; *Moore v. N. Y. Cotton Exchange*, 270 U. S. 593, 46 Sup. Ct. 367, 70 L. ed. 750, 45 A. L. R. 1370); *Layton v. State*, 165 Ga. 265, 140 S. E. 847.

Not Violative of "United States Cotton-Futures Act".—The act does not prohibit such transactions as are regulated by and fall within the terms of the act of Congress known by the short title of "United States cotton-futures act." Fed. Stat. Ann. Supp. 1918, p. 359. *Layton v. State*, 165 Ga. 265, 140 S. E. 847.

Intent to Gamble Required.—These sections properly construed, do not apply to contracts for future delivery where there is an intent that the commodity bought or sold shall actually be delivered, but makes penal transactions on margins for future delivery where it is the intent to gamble on the fluctuations of the market; that is, where there is no intent to make actual delivery and "when the intention or understanding of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement." *Layton v. State*, 165 Ga. 265, 140 S. E. 847; *Fenner v. Boykin*, 3 Fed. (2d), 674, affirmed in 271 U. S. 240, 46 S. Ct. 492.

Contracts Illegal Under Former Section 4258.—This section does not apply to gaming as referred to in section 4256, and as defined in *Dyer v. Benson*, 69 Ga. 609. Nor does it authorize suits to recover money or property after it has been paid over in transactions such as are described in the act. *Lasseter v. O'Neill*, 162 Ga. 826, 833, 135 S. E. 78. Same case 36 Ga. App. 55, 135 S. E. 224.

In accordance with the general rule where persons are in pari delicto in the violation of a positive law, this section contemplates leaving the parties where it found them. *Lasseter v. O'Neill*, 162 Ga. 826, 833, 135 S. E. 78.

As to cotton futures contracts, see note under section 4256.

When Proviso Applies.—The proviso applies to transactions where a party, by himself or agent, writes or wires to another party, or his agent, in another State. This is not unlawful. In the present case it is contended that in this State, a person, acting through the firm of Fenner & Beane, wrote or wired to the head office or other office of that firm in another State. Such a transaction would be lawful or unlawful, depending upon whether there was in good faith at the time an intention to make or receive actual delivery or to "settle on the difference between the agreed price and the market price." *Layton v. State*, 165 Ga. 265, 140 S. E. 847.

Not applicable where claimant is seeking to set up his possession in face of his own deed, as against purchaser for value. *Rimes v. Floyd*, 168 Ga. 426, 148 S. E. 86.

The use of the word "parties" in this section is not to be construed as meaning that such intention must have been entertained by the parties on both sides of the contract. It is used in the sense of persons either buying or selling without intention to make actual delivery, without regard to the intention of the party or parties contracted with. *Layton v. State*, 165 Ga. 265, 140 S. E. 847.

§ 4264(1). Meaning of "contract of sale;" "person."—For the purpose of this Act the term "contract for sale" shall be held to include sales, purchases, agreements of sale, agreements to sell, and agreements to purchase; that the word "person" wherever used in this Act shall be construed to import the plural or singular as the case demands, and shall include individuals, associations, partnerships, and corporations. Acts 1929, p. 245, § 1.

§ 4264(2). Future delivery contracts of sale; when valid.—All contracts of sale for future delivery of cotton, grain, stocks, or other commodities, (1) made in accordance with the rules of any board of trade, exchange, or similar institution, and (2) actually executed on the floor of such board of trade, exchange, or similar institution, and performed or discharged according to the rules thereof, and (3) when such contracts of sale are placed with or through a regular member in good standing of a cotton exchange, grain exchange, board of trade, or similar institution, organized under the laws of the State of Georgia or any other State, shall be and they hereby are declared to be valid and enforceable in the Courts of this State, according to their terms. Provided, that contracts of sale for future delivery of cotton, in order to be valid and enforceable as provided herein, must not only conform to the requirements of clauses one and two of this section, but must also be made subject to the provision of the United States Cotton Futures Act approved August 11th, 1916, and any amendments thereto. Provided further, that if this clause should for any reason be held inoperative, then contracts for future delivery of cotton shall be valid and enforceable if they conform to the requirements of clauses one and two of this section. Provided further, that all contracts as de-

fined in section one hereof, where it is not contemplated by the parties thereto that there shall be an actual delivery of the commodities sold or bought, shall be unlawful. Acts 1929, p. 245, § 2.

§ 4264(3). Contracts without bona fide intent to deliver, void. — That any contract of sale for future delivery of cotton, grain, stocks, or other commodities, where it is not the bona fide intention of parties that the things mentioned therein are to be delivered, but which is to be settled according to or upon the basis of the public market quotations or prices made on any board of trade, exchange, or other similar institution, without any actual bona fide execution and the carrying out of such contract upon the floor of such exchange, board of trade, or similar institution, in accordance with the rules thereof, shall be null and void and unenforceable in any court of this State, and no action shall be maintained thereon at the suit of any party. Acts 1929, p. 246, § 3.

§ 4264(4). "Bucket shop" defined.—A bucket-shop is hereby defined to be and mean any place of business wherein are made contracts of the sort or character denounced by the preceding section 3, and the maintenance or operation of a bucket-shop at any point in this State is prohibited. Acts 1929, p. 246, § 4.

§ 4264(5).—Written statement to principal in contract, requirement as to.—Every person shall furnish, upon demand, to any principal for whom such person has executed any contract for future delivery of any cotton, grain, stocks, or other commodities, a written instrument setting forth the name and location of the exchange, board of trade, or similar institution, upon which such contract has been executed, the date of the execution of the contract, and the name and address of the person with whom such contract was executed; and if such person shall refuse or neglect to furnish such statement upon reasonable demand, such refusal or neglect shall be prima facie evidence that such contract was an illegal contract within the provisions of section 3 of this Act, and that the person who executed it was engaged in the maintenance and operation of a bucket-shop, within the provisions of following section. Acts 1929, p. 247, § 5.

§ 4264(6). Party or agent in illegal contract, guilty of felony; penalty.—Any person either as agent or principal, who enters into or assists in making any contracts of sale of the sort or character denounced in the preceding section 3 of this Act, for the future delivery of cotton, grain, stocks, or other commodities, or who maintains a bucket-shop as that term is defined in section 4 of this Act, shall be guilty of a felony, and upon conviction shall be imprisoned in the penitentiary not exceeding two years. Acts 1929, p. 247, § 6.

§ 4264(7). Cotton exchanges; boards of trade.—There may be organized, in any city, town, or municipality in the State of Georgia, voluntary associations to be known as cotton exchanges, boards of trade, or similar institutions, to receive

and post quotations on cotton, grain, stocks, or other commodities for the benefit of the members or other persons engaged in the production of cotton, grain, or other commodities. Such association shall be composed of members, and shall adopt a uniform set of rules and regulations not incompatible with the laws of Georgia and of the United States. They shall open their books to inspection of all proper courts and officers when required to do so. Acts 1929, p. 247, § 7.

§ 4264(8). Laws Repealed. — The following sections of the Civil Code of Georgia, to wit: section 4257 prohibiting dealing in cotton futures, section 4258 providing what contracts are illegal, section 4259 providing a penalty, section 4260 relating to discovery by witnesses, and excusing witnesses from testifying, and section 4261 providing what facts shall constitute guilt, section 4262 relating to margins, when proof of guilt, section 4263 relating to establishment of an office when proof of guilt, and section 4264 providing that bona fide trade is not prohibited, and section 403 of the Penal Code, relating to dealing in futures, each and all are hereby repealed. Acts 1929, p. 247, § 8.

§ 4264(9). Invalidity of part of Act not to invalidate remainder.—If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, or paragraph of part thereof directly involved in the contracts in which such judgment shall have been rendered; and any contract valid under and satisfying the remaining clauses, sentences, paragraphs, or parts of this Act shall be valid and enforceable in the courts of this State. Acts 1929, p. 248, § 9.

CHAPTER 5

Of Construction of Contracts

§ 4265. (§ 3672). Contracts, by whom construed.

Cited in *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 464, 144 S. E. 327.

§ 4266. (§ 3673.) Intention of parties must be sought.

See notes to § 4268.

Secret Intentions.—In *Atlanta, etc., Bank v. First Nat. Bank*, 38 Ga. App. 768, 771, 145 S. E. 521, it is said: "Although it was testified by Q that he purposely made the check payable to the manufacturer because some doubt that had been engendered in his mind as to the solvency of the local dealer with whom he made the contract of purchase, this intention remained a secret in his own mind, and the effect of the instrument which he then made and put into circulation must be determined by his intention as expressed in the words of the written agreement (of which the check was a part), construed in the light of the attendant and surrounding circumstances."

Pledge Contract.—Although there may be special rules of interpretation which would require that the pledge contract be construed favorably to the pledgor, or to the maker of one of the notes so pledged, and strictly against the pledgee, the ultimate and final criterion, as in all cases, is that

the real object of the court should be to ascertain the intention of the parties; and that where such intention is clear and contravenes no rule of law, and sufficient words are used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction. *Deen v. Bank of Hazlehurst*, 39 Ga. App. 633, 147 S. E. 909.

Deeds.—See *Hill v. Smith*, 163 Ga. 71, 135 S. E. 423, holding substantially the same as the cases in the first paragraph under this catchline in the Georgia Code of 1926.

Section applied in *Lanier v. Register*, 163 Ga. 236, 135 S. E. 719; *Miller v. First Nat. Bank*, 35 Ga. App. 334, 132 S. E. 783.

Applied as to contract of sale of automobile in *Motors Mortgage Corp. v. Purchase-Money Note Co.*, 38 Ga. App. 222, 143 S. E. 459.

§ 4267. (§ 3674.) Intention of one party known to the other.

Listing Property as Evidence Entitling Commissions.—In a suit for a real-estate broker's commissions the burden is on the plaintiff to establish a contract of listment and its performance on his own part. While the letter and telegram of the defendant did not bind him in express terms to pay commissions, it can not be questioned that in thus agreeing to list the property with the plaintiff he must have known that the plaintiff understood he was to receive the commission which had been specified in the letters to which the defendant was replying. Accordingly, there was established a contract listing the property with the plaintiff broker, which, had it been performed according to its terms, would have entitled the plaintiff to the commissions sued for. *Hall v. Vandiver*, 37 Ga. App. 656, 141 S. E. 332.

Expressed Terms.—In *Columbus Bagging Co. v. Empire Mills Co.*, 38 Ga. App. 793, 796, 145 S. E. 886, it is said: "The defendant must have believed that the plaintiff intended to enter into contractual relations upon the terms expressed in its offer, and the existence of such belief must have been apparent to the plaintiff. The rule stated in this section seems to refer only to completed contracts, but we think the reason of it is applicable in the present case."

Applied in *Slade v. Raines*, 16 Ga. 859, 132 S. E. 56; *Googe v. York*, 48 Ga. App. 62, 64, 142 S. E. 562.

§ 4268. (§ 3675.) Rules of interpretation.

Where Contract Ambiguous.—Where the description of land applies equally to several tracts, a latent ambiguity results, which may be explained by showing which one of the several tracts was claimed by the grantor. 2 *Delvin on Real Estate* (3d ed.), 2026, section 1043. *Petretes v. Atlanta Loan, etc., Co.*, 161 Ga. 468, 473, 131 S. E. 510.

Applied.—*Rogers-Morgan Co. v. Webb*, 34 Ga. App. 424, 130 S. E. 78; *Miller v. First Nat. Bank*, 35 Ga. App. 334, 335, 132 S. E. 783; *Napier v. Pool*, 39 Ga. App. 190, 146 S. E. 783.

Insurance Policy.—In accordance with this section, where an insurance policy required an inventory to be taken it was held that a list showing the cost price of the articles was sufficient and that the actual value was not required. *Goldman v. Aetna Ins. Co.*, 162 Ga. 313, 133 S. E. 741.

Determined by Intention—Example.—In a contract where the date named was not fixed as a final and definite date for delivery, but the time of shipment could be accelerated or deferred at the will of the vendee, it could not reasonably be said that shipment on the particular date mentioned in the agreement was intended by the parties to be of the very essence of the contract. *Cobb Lumber Co. v. Sunny South Grain Co.*, 36 Ga. App. 140, 135 S. E. 759.

Contract of Employment.—Where an agency was established in order that the agent or servant might take a car to a certain place for the purpose of sale, provided that if he failed to sell it, he would have it back that night before the employer's garage was closed, time was of the very essence of the conditional employment; and the servant's authority and the master's liability were limited accordingly. *Palmer v. Heinzerling*, 34 Ga. App. 544, 130 S. E. 537.

The rent note sued on being clear and unambiguous, the court properly struck the plea which sought to vary the note by parol evidence, and did not err in excluding the testimony offered to sustain the plea. *Sewell v. Armour Fertilizer Works Inc.*, 39 Ga. App. 516, 147 S. E. 717.

Division of Consideration.—While proof of parol contemporaneous agreements is generally inadmissible to add to, take from, or vary a written contract (Civil Code sections 4268, 5788), the allegations of the petition setting forth the division to be made of the consideration to be paid to the co-obligees under the contract do

not come within the inhibition of these sections of the code, since such alleged facts in nowise add to, take from, or vary the terms of the written instrument, but merely set forth the respective interests of the obligees. *Bernstein v. Fagelson*, 38 Ga. App. 294, 296, 143 S. E. 237.

Paragraph 1.—This case is controlled by that of *Cody v. Automobile Financing Inc.*, 37 Ga. App. 452, 140 S. E. 634; and under the rulings there made, the court in the instant case erred in admitting the evidence which directly contradicted the express provisions of the written contract. See also *Hadden v. Williams*, 37 Ga. App. 464, 140 S. E. 797; *Nolan v. Calhoun*, 38 Ga. App. 227, 143 S. E. 606.

Paragraph 2.—Applied as to construction of a fire insurance policy in *Continental Life Ins. Co. v. Wells*, 38 Ga. App. 99, 100, 142 S. E. 900.

Paragraph 6.—While it is well settled that in this State that when a contract is partly written and partly printed, the written portion is entitled to "most consideration" (this section, par. 6), and that if the printed portions of the contract can not be reconciled with the written portions, the latter prevail (*Shackleford v. Fitzgerald*, 151 Ga. 35, 39, 105 S. E. 597; *Caddick Milling Co. v. Moultrie Grocery Co.*, 22 Ga. App. 524, 96 S. E. 583; *Surles v. Milliken*, 97 Ga. 485, 25 S. E. 322), still the cardinal rule of construction is to ascertain the intention of the parties, and "the construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part." (§ 4268, par. 3). *Capital Wall Paper Co. v. Callan Court Co.*, 38 Ga. App. 428, 144 S. E. 135.

Where the printed portion of a lease contract stipulated in part that "the lessor will not be responsible to the tenant or any other person for any loss of or damage to property, however occurring," and a written provision of the agreement stipulated that "the lessor agrees to furnish steam heat during the regular seasons for heat in the City of Atlanta, Georgia," the written and printed portions of the agreement must be construed in pari materia, and that construction placed upon the contract which will uphold it in whole and in every part, since there is no irreconcilable conflict between the quoted provisions. The printed portion of the agreement does not relieve the lessor from liability for a breach of his covenant to furnish heat, but only from liability for resulting damage to property growing out of such a failure. *Capital Wall Paper Co. v. Callan Court Co.*, 38 Ga. App. 428, 144 S. E. 135.

Paragraph 8.—Although time is not generally of the essence of a contract, it may become so by express stipulation or reasonable construction, and it is competent for the parties to a series of promissory notes, maturing monthly through several years, to provide that in case of default in the payment of any two of them, and a continuation of such default for a specified period, the entire series shall, at the option of the holder thereof, become due and collectible. *Cone v. Hunter*, 38 Ga. App. 45, 142 S. E. 468.

CHAPTER 6

Negotiable Instruments

ARTICLE 1

Of Negotiable Papers and How Transferred

§§ 4269(16), 4269(17). Park's Code.

See §§ 4294(16), 4294(17).

§§ 4270(3), 4270(4). Park's Code.

See §§ 4294(26), 4294(27).

§§ 4271(1), 4271(14), 4271(20). Park's Code.

See §§ 4294(30), 4294(43) and 4294(49), respectively.

§§ 4272(1), 4272(2), 4272(6), 4272(7), 4272(9). Park's Code.

See §§ 4294(51), 4294(52), 4294(56), 4294(57), 4294(59), respectively.

§§ 4273(2), 4273(3), 4273(6). Park's Code.

See §§ 4294(61), 4294(62), 4294(65), respectively.

§ 4275(21). Park's Code.

See § 4294(109).

§ 4276. (§ 3684.) Transfer of secured note carries security.

Applicability to Security Deed.—See First Nat. Bank v. Pounds, 163 Ga. 551, 136 S. E. 528, quoting the second paragraph under this catchline in the Georgia Code of 1926.

When the transferee of the purchase-money note reduces the same to judgment, it is the duty of the vendor to convey the land by quitclaim deed to the purchasers, to enable the transferee to levy upon and sell the same under an execution issued upon the judgment obtained for the purchase-money; and upon refusal of the vendor to make such conveyance when requested to do so by his transferee, a court of equity will compel the vendor to make such conveyance. *Holbrook v. Adams*, 166 Ga. 871, 144 S. E. 657.

Where a vendor sells land, takes a note for a part of the purchase-money thereof, payable to himself or bearer, and gives to the purchasers his bond for title, by which he obligates himself to convey the land to them on payment of the note, the vendor holds the title to the land as security for the payment of the purchase-money; and when by mere delivery he transfers the note for value, before due, to another, the transferee acquires the security held by the vendor. *Holbrook v. Adams*, 166 Ga. 871, 144 S. E. 657.

Transmission by Express Assignment.—In the case of *Cross v. Citizens Bank*, 160 Ga. 647, 128 S. E. 898, it was said: "The foregoing refers to implied transmission of title to the security, but does not purport to exclude transmission by express written assignment of the notes and security, or to qualify the effect of such written assignment." (See also *Carter v. Johnson*, 156 Ga. 207, 119 S. E. 22; *Carlton v. Reeves*, 157 Ga. 602, 122 S. E. 320); *Georgia Land & Sec. Co. v. Citizens Bank*, 164 Ga. 852, 855, 139 S. E. 557.

§ 4276(2). Park's Code.

See § 4294(120).

ARTICLE 2

Of Indorsers, Notice, and Protest

§ 4284. (§ 3692). Public holidays.

As to Armistice day as legal Holiday, see § 1770(81).

§ 4284(1). Park's Code.

See § 4294(184).

ARTICLE 3

Of the Rights of Holders

§ 4291; (§ 3699.) What is notice.—Any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due.

The principle embraced in this section was not, as to warehouse receipts, superseded by section 4294(56), and the court did not err in giving this principle in charge to the jury. *National Bank v. Maryland Casualty Co.*, 167 Ga. 737, 738, 146 S. E. 739.

ARTICLE 4

Negotiable Instrument in General

SECTION 1

Form and Interpretation

§ 4294(16). Delivery; when effectual; when presumed.

Applied in *Hengstler v. Huguley-Scott Auto Company*, 39 Ga. App. 287, 146 S. E. 645.

§ 4294(17). Construction where instrument is ambiguous.

A promissory note signed by two or more persons as makers, and containing the words, "I, we, or either of us promise to pay," imports joint and several liability of the makers. This comports with this section. *Powell v. Mobley*, 166 Ga. 163, 164, 142 S. E. 678.

SECTION 2

Consideration

§ 4294(26). What constitutes holder for value.

Not Applicable to Cotton Warehouse Receipts.—The court did not err in failing to give in charge to the jury the principle embraced in section 26 of our negotiable instruments law, as cotton warehouse receipts are not negotiable instruments under said law, and said section is applicable only to instruments negotiable thereunder. The verdict and decree were supported by the evidence. *National Bank v. Maryland Casualty Co.*, 167 Ga. 737, 738, 146 S. E. 739.

§ 4294(27). When lien on instrument constitutes holder for value.

Applied in *In re Blalock* (Ga.), 31 Fed. (2d) 612.

SECTION 3

Negotiation

§ 4294(30). What constitutes negotiation.

Effect of Transfer for Affection upon Necessity for Indorsement.—See *Moore v. Moore*, 35 Ga. App. 39, 131 S. E. 922, quoting the holding under this catchline in the Georgia Code of 1926.

Where a note payable to a named person or bearer is secured by a mortgage likewise payable to such person or bearer, the delivery of the note and mortgage to a third person transfers the lien of the mortgage, independently of any separate assignment in writing of the mortgage. *Mercer v. Raybon*, 168 Ga. 500, 148 S. E. 334.

No one can be holder in due course of note payable to named payee or order, without payee's indorsement. *Fourth National Bank v. Lattimore*, 168 Ga. 550, 148 S. E. 396.

§ 4294(43). Indorsement where name is misspelled, etc.

In *Atlanta, etc., Bank v. First Nat. Bank*, 38 Ga. App. 768, 773, 145 S. E. 521, after quoting this section, it is said: "It would seem that under the facts of this case it should be held that the payee was the Stutz Atlanta Motor Company, and that its name was wrongly designated. In this view, it would again result that the indorsements made upon the check were legal and proper. *First National Bank v. National Bank*, 136 Va. 276, 118 S. E. 82, 36 A. L. R.

736; Integrity Trust v. People's National Bank, Co. v. Lehigh Ave., etc., Bldg. & Loan Asso., 273 Pa. 46, 116 Atl. 539, 21 A. L. R. 1554."

§ 4294(49). Transfer without indorsement; effect of.

Transfer for Love and Affection.—Neither under the N. I. L. nor under the law as it previously existed, does the legal title to a negotiable promissory note, payable to order, pass to a transferee for a consideration of love and affection only and not for value, except by indorsement upon the instrument itself or upon a paper attached to it. Such a transferee, therefore, acquires no legal title to the note by a separate transfer to him in writing executed by the payee but unattached to the note. *Moore v. Moore*, 35 Ga. App. 39, 131 S. E. 922.

SECTION 4

Rights of the Holder

§ 4249(51). Rights of the holder to sue; payment.

Applied in *Fourth Nat. Bank v. Lattimore*, 168 Ga. 547, 550, 148 S. E. 396.

§ 4249(52). What constitutes a holder in due course.

See notes to § 4291.

Receiving Note as Collateral.—A transferee of a negotiable promissory note, who received the note from the payee before maturity, as collateral security for the payment of a pre-existing debt, without notice of any equities existing between the maker and the payee, is a bona fide holder for value. Civil Code (1910), § 4289; *Linderman v. Atkins*, 143 Ga. 366 (2), 85 S. E. 101; *Patterson v. Peterson*, 15 Ga. App. 680 (2), 84 S. E. 163; *Whittle v. Citizens Bank*, 37 Ga. App. 693, 141 S. E. 668.

§ 4294(56). What constitutes notice of defect.

See notes to § 4530.

A promissory note given in the year 1921 for the purchase-price of liquors sold in violation of the law is unenforceable, even in the hands of a bona fide holder for value, who takes the same without notice of the consideration. *Crigler v. Laramore*, 18 Ga. App. 132, 88 S. E. 901; *White County Bank v. Clermont State Bank*, 37 Ga. App. 268, 140 S. E. 767; *Farmers & Merchants Bank v. Miller*, 37 Ga. App. 668, 141 S. E. 419.

The circumstances relied on to overcome the presumption that one is the bona fide holder of a negotiable paper must have some probative force. To this effect see *Edwards & Leutsch Lithographing Co. v. Vidalia Grocery Co.*, 144 Ga. 514, 87 S. E. 675; *Traders Securities Co. v. Canton Drug Co.*, 38 Ga. App. 165, 171, 143 S. E. 452.

Applied in *Citizens & Southern Bank v. Farr*, 164 Ga. 880, 882, 139 S. E. 658.

§ 4294(57). Rights of holder in due course.

Editor's Note.—In *Commercial Bank v. Cohen*, 34 Ga. App. 756, 131 S. E. 117, the court held that "a check given for whisky, being for an illegal consideration is void and therefore not enforceable even by an innocent purchaser of the check." This decision was based upon section 4286, which has now been superseded by the provisions of the N. I. L. It seems probable that the cause of action in the case referred to arose prior to the adoption of the N. I. L. since by that law illegal consideration is not a valid defense against a holder in due course.

And also in *Howard v. Caldwell*, 35 Ga. App. 366, 133 S. E. 284, it is stated that under section 4286 the only defenses permissible against a bona fide holder of a promissory note are non est factum, gambling or immoral or illegal consideration and fraud in the procurement. The court does not mention this section under which all but the first of these are no longer defenses against a holder in due course.

Defense of Non Est Factum by Partner.—As against a bona fide holder the defense of non est factum set up by a member of a partnership in a suit upon a note signed by the firm amounts only to a denial of the factum of the partnership's execution of the note and cannot concern itself with restrictions upon the authority of the other partner. See *Cooke v. Faucett*, 35 Ga. App. 209, 132 S. E. 268. This case was decided under section 4286 but it seems to apply equally to this section as the defense of non est factum is still available as against a holder in due course.

The holder of an instrument as collateral is a holder in due course only to the extent of the debt secured. *Wyche v. Bank*, 161 Ga. 329, 130 S. E. 566.

§ 4294(59). Who deemed holder in due course.

Since it appears conclusively from the evidence that the defendant had not established any defense to the note, he can not dispute the title of the plaintiff as a transferee upon the ground that the plaintiff was not a bona fide purchaser for value. *Jones v. Roper*, 39 Ga. App. 309, 147 S. E. 156.

Applied in *Hengstler v. Huguley-Scott Auto Company*, 39 Ga. App. 287, 146 S. E. 645.

SECTION 5

Liabilities of Parties

§ 4294(61). Liability of drawer.

Applied in *Hengstler v. Huguley-Scott Auto Company*, 39 Ga. App. 287, 146 S. E. 645.

§ 4294(62). Liability of acceptor.

Applied in *Massell v. Fourth Nat. Bank*, 38 Ga. App. 601, 602, 144 S. E. 806.

§ 4294(65). Warranty where negotiation by delivery, etc.

Warehouse Receipt.—In the recent case of *Continental Trust Co. v. Bank*, 162 Ga. 758, 764, 134 S. E. 775, construing section 4277, it was held that the transferor of a cotton warehouse receipt impliedly warrants that the cotton represented by such receipt is in existence at the time the receipt is transferred.

SECTION 7

Notice of Dishonor.

§ 4294(109). Waiver of notice.

In the trial of this action against the drawer of certain drafts which were cashed by the plaintiff bank and later dishonored by the drawee, the evidence established conclusively and as a matter of law an implied waiver of notice of dishonor, and instructions which had the effect of eliminating the want of such notice as a defense were not erroneous. *Biggers v. Bank*, 38 Ga. App. 512, 144 S. E. 397.

SECTION 8

Discharge of Negotiable Instruments

§ 4294(120). When persons secondarily liable on; discharged.

Necessity for Consideration to Discharge.—See *Gay v. Carpenter*, 35 Ga. App. 768, 134 S. E. 803, affirming the holding stated under this catchline in the Georgia Code of 1926.

Retaking of Property by Seller.—A retaking of property

by the seller, for the purpose of holding it until the purchaser, who is the maker of a note for it, has paid part of the purchase money, and a release of the property then to the purchaser, when such retaking in no wise increases the surety's risk, does not release the surety. *Gay v. Carpenter*, 35 Ga. App. 768, 134 S. E. 803.

ARTICLE 6

Promissory Notes and Checks

§ 4294(184). Promissory note defined.

Agreement to Pay in Specifics.—All agreements to pay in specifics are presumed to be made in favor of the debtor, and he has the option of paying the debt either in specifics or in money amounting to the value of the specifics. *Mobley v. Tufts*, 36 Ga. App. 764, 765, 138 S. E. 272.

CHAPTER 7

Of Defenses to Contracts

ARTICLE 1

Denial of the Contract

§ 4296. (§ 3702.) Effect of alteration.

Applied in *Blaylock v. Walker County Bank*, 36 Ga. App. 377, 136 S. E. 924; *Aspinwall v. Holland*, 39 Ga. App. 605, 147 S. E. 897; *Miller v. Griffin*, 39 Ga. App. 705, 148 S. E. 354.

Cited in *Gardner v. Fleetwood*, 39 Ga. App. 51, 146 S. E. 127.

§ 4299. (§ 3705.) Indorsement, etc., not to be proved.

Applied in *Massell v. Fourth Nat. Bank*, 38 Ga. App. 601, 602, 144 S. E. 803.

Stated in *Pope v. Woolford Realty Co.*, 35 Ga. App. 284, 134 S. E. 174.

ARTICLE 2

Denial of the Obligation of a Contract, Either Originally or by a Subsequent Act of the Opposite Party

§ 4301. (§ 3707.) Conditions.

Applied in *Rogers v. Southern Fertilizer, etc., Co.*, 36 Ga. App. 229, 136 S. E. 106.

§ 4304. (§ 3710.) Rescission.

When Rescission Complete.—If, while an option to purchase rented premises was in force, it was, by mutual agreement between the parties, surrendered to the maker in full satisfaction and discharge of the several rent notes due him, the rent contract was effectually rescinded. *Robinson v. Odom*, 35 Ga. App. 262, 133 S. E. 53.

§ 4305. (§ 3711.) Rescission for fraud.

Opportunity of Party to Redress Wrong.—See *Henderson v. Lott*, 163 Ga. 326, 335, 136 S. E. 403, quoting the holding under this catchline in the Georgia Code of 1926.

Contract Not Void.—See *Henderson v. Lott*, 163 Ga. 326,

335, 136 S. E. 403, quoting the holding under this catchline in the Georgia Code of 1926.

Restitution—When Unnecessary.—Where an ex-husband fraudulently induced his ex-wife to accept a much less amount of alimony than she was entitled to under her judgments, it was not necessary to restore or offer to restore the amount of alimony which she received under the contract. *Ellis v. Ellis*, 161 Ga. 360, 365, 130 S. E. 681, citing *Farnell v. Brady*, 159 Ga. 209, 125 S. E. 57.

Restitution a Condition Precedent.—The general rule is that one who seeks the rescission of a contract on the ground of fraud must restore or offer to restore the consideration received thereunder, as a condition precedent to bringing the action. *Napier v. Adams*, 166 Ga. 403, 409, 143 S. E. 566.

Time of Restoration.—The party seeking rescission must proceed with his offer to restore what he has received, with that promptitude which the nature of the case and environment of the circumstances would require, as manifesting an intention to treat, from the discovery of the fraud, what he has received as the property of the other party. If he waits an unreasonable long time to tender back the subject of the contracts, the other party may well assume an abandonment of the effort to rescind. *Manget v. Cunningham*, 166 Ga. 71, 87, 142 S. E. 543. See *Henderson v. Lott*, 163 Ga. 326, 335, 136 S. E. 403; *Gibson v. Alford*, 161 Ga. 672, 132 S. E. 442.

Effect of Recognition after Knowledge.—Where one is entitled to rescind a contract on ground of fraud or false representations, and who has full knowledge of the material circumstances of the case, freely and advisedly does anything which amounts to a recognition of the transaction, or acts in a manner inconsistent with a repudiation of the contract, such conduct amounts to acquiescence, and, though originally impeachable, the contract becomes unimpeachable in equity. *Gibson v. Alford*, 161 Ga. 672, 132 S. E. 142. See also *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 26, 128 S. E. 70.

Applied in *Williams v. Fouche*, 164 Ga. 311, 138 S. E. 580.

Cited in *Decatur County v. Praytor, etc., Co.*, 165 Ga. 742, 756, 142 S. E. 73.

§ 4306. (§ 3712.) Without consent.

Effect of Recognition after Knowledge.—See same catchline under section 4305.

Stated in *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 26, 128 S. E. 70.

§ 4309. (§ 3715.) Release.

The release of one of the persons so jointly liable operated, prima facie, as a release of the others, and the obligation was apparently no longer enforceable against them. *Middlebrooks v. Phillips*, 39 Ga. App. 263, 146 S. E. 653.

ARTICLE 3

Of Payment, and Herein of Appropriation of Payments

§ 4311. (§ 3717.) Payment generally.

Under this section, if a general agent to collect money receives in payment property other than money, the creditor, so far as the debtor is concerned, is bound thereby. *Armour Fertilizer Works v. Maddox*, 168 Ga. 429, 148 S. E. 152.

§ 4314. (§ 3720.) Bank-bills, checks, and notes, payment in.

General Effect of Giving Check or Note—Acceptance of Offer.—The mailing of a check to the plaintiff on March 27, including rent through March 31, in compliance with the express offer contained in the bill for rent presented by the plaintiff on March 27, would not of itself amount to an acceptance of the offer by noon of March 30, as required by the terms of the offer. *Williams-Thompson Co. v. Louisville, etc., R. Co.*, 35 Ga. App. 556, 558, 133 S. E. 633.

Promissory note reciting that it was for balance on ac-

count was not payment, where not itself paid; error in not admitting testimony that it was given and accepted not as settlement, but merely as matter of bookkeeping. *Schneider Marble Co. v. Knight*, 37 Ga. App. 646(3), 141 S. E. 420.

Whether the receipt of a promissory note amounts to a payment of the original debt depends upon the intention of the parties, and this intention may be proved by parol testimony if the writing itself is silent or ambiguous on the question. *Schneider Marble Co. v. Knight*, 37 Ga. App. 646, 141 S. E. 420.

One receiving a bank check for collection and application must exercise reasonable diligence in presenting it for payment, and if he negligently holds it for an unreasonable time, without presentation, it is at his own risk. *National City Co. v. Mayor & Council*, 38 Ga. App. 491, 144 S. E. 336.

The taking of a promissory note from a tenant by a landlord for an amount of rent, even after the rent is due, and even though the note is payable in the future, will neither extinguish nor postpone the landlord's right to distrain, nor prevent final judgment in his favor in the distress-warrant proceeding, where the note is surrendered to the maker, or is sufficiently accounted for by showing that the maker will incur no further risk of liability thereon. *Brooks v. Jackins*, 38 Ga. App. 57, 142 S. E. 574.

Where personal property is delivered to another under an agreement that he is to pay cash therefor, and where the cash payment is made by a check, which the person receiving believes to be good, but which afterwards proves to be worthless, no contract of sale arises, and no title to the property passes. *Chafin v. Cox*, 39 Ga. App. 301, 147 S. E. 154.

Applied in *Manget v. National City Bank*, 168 Ga. 876, 882, 149 S. E. 213.

§ 4316. (§ 3722.) Appropriation of payments.

Direction by Wife of Debtor.—Directions as to the application of payments by the wife of the debtor, she not being the agent of the debtor, do not bind the creditor. *Neal v. Harber*, 35 Ga. App. 628, 134 S. E. 347.

§ 4317. (§ 3723.) Voluntary payments.

Taxes—Recovery.—Where a corporation pays an alleged illegal occupation tax and it does not appear from the petition that there was a provision for any penalty by arrest, fine, or imprisonment, or by seizure of property, or by molestation of business, for failure to pay the license tax assessed the payment cannot be said to come under the exceptions in this section. *Savannah v. Southern Stevedoring Co.*, 36 Ga. App. 526, 137 S. E. 123.

This section is not unconstitutional for the reason that it violates the due-process clauses of the State and Federal constitutions. *Strachan Shipping Co. v. Mayor & Aldermen*, 168 Ga. 309, 147 S. E. 555.

Mere apprehension or threats of a civil proceeding to enforce a claim, unaccompanied by any act of hardship or of oppression, does not render a payment in response thereto involuntary in the sense that it can be recovered, under this section. *Strachan Shipping Co. v. Mayor & Aldermen*, 168 Ga. 309, 147 S. E. 555.

Likewise, money paid under an apprehension or threat of a criminal prosecution, when no warrant has been issued or proceeding begun, and there is no urgent and immediate danger, does not constitute duress so as to make the payment compulsory. *Strachan Shipping Co. v. Mayor & Aldermen*, 168 Ga. 309, 147 S. E. 555.

To the above rule there is this exception: Where there are demands and threats of persons clothed with governmental authority to carry them into execution by arrest and prosecution, the case stands on a different footing from demands and threats of private individuals, and money paid because thereof may generally be recovered. *Strachan Shipping Co. v. Mayor & Aldermen*, 168 Ga. 309, 147 S. E. 555.

Payment under Threats of Arrest.—Payment of a judgment alleged to be void, where the facts are all known by the defendant, and there is no misplaced confidence, and no artifice, deception, or fraudulent practice used by the other party, is a voluntary payment, and can not be recovered, unless made under an urgent and immediate necessity therefor, or to release person or property, although such payment is made under protest. A mere threat to levy such execution if not paid promptly or at once does not render the payment involuntary. *West v. Brown*, 165 Ga. 187, 140 S. E. 500, citing *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256.

Applied in *Daniel Brothers Company v. Richardson*, 39

Ga. App. 121, 146 S. E. 505; *Wardlaw v. Withers*, 39 Ga. App. 600, 148 S. E. 16; *Darby v. Vidalia*, 168 Ga. 842, 149 S. E. 223.

ARTICLE 4

Of Performance, and Herein of Tender

§ 4318. (§ 3724.) Performance of contracts.

See notes to § 4305.

Substantial Compliance.—Where an entire lighting plant, with the exception of a certain valve designated as "one iron, free gratis," was delivered within the time allowed under the contract and the seller notified the purchaser that such valve was not then in stock but would be subsequently forwarded, and "it was shipped later by express," the jury were authorized to find that the seller had substantially complied with his obligation to deliver the entire plant within a reasonable time. *Morgan v. Colt Co.*, 34 Ga. App. 630, 130 S. E. 600.

§ 4321. (§ 3727.) Fault of other party.

See notes to § 4305.

§ 4322. (§ 3728.) Tender.

Incomplete Tender Not within Section.—See *Jeanes v. Atlanta, etc., Nat. Bank*, 34 Ga. App. 568, 570, 130 S. E. 353, holding the same as the second paragraph under this catchline in the Georgia Code of 1926.

ARTICLE 5

Accord and Satisfaction

§ 4326. (§ 3732.) What is accord and satisfaction.

Promise in Executory Agreement.—See *Messenger Pub. Co. v. Overstreet*, 36 Ga. App. 458, 137 S. E. 125, holding substantially the same as the first sentence under this catchline in the Georgia Code of 1926.

A dispute or controversy is not an essential element of some forms of accord and satisfaction, as an accord and satisfaction of a liquidated claim by the giving and acceptance of a smaller sum and some additional consideration, such as new security, payment of the debts before due, payment by a third person, or where property, or personal services are accepted from an insolvent debtor in satisfaction. *Burgamy v. Holton*, 165 Ga. 384, 141 S. E. 42.

§ 4328. (§ 3734.) Must be of benefit to creditor.

Generally an essential element to sustain an accord and satisfaction of an entire debt or disputed claim by the giving of a less sum of money than that claimed, and nothing more, is a bona fide dispute or controversy; but this rule does not apply where the damages are unliquidated. *Burgamy v. Holton*, 165 Ga. 384, 141 S. E. 42.

Applied in *Decatur Bank & Trust Co. v. American Sav. Bank*, 166 Ga. 789, 144 S. E. 285; *Decatur Bank & Trust Co. v. Hibernia Savings, Building & Loan Assn.*, 166 Ga. 789, 144 S. E. 285.

§ 4329. (§ 3735.) Less than debt is not satisfaction.

Accord and Satisfaction or Demurrer.—If a creditor agrees to accept a less amount than his claim in property, and does accept it in discharge of such claim, the defendant may plead it by way of accord and satisfaction; or, if such facts appear from the petition of the plaintiff, he can take advantage of it by demurrer. *Burgamy v. Holton*, 165 Ga. 384, 141 S. E. 42.

ARTICLE 6

Of Pendency of Another Action, and Former Recovery

§ 4331. (§ 3737). Plaintiff required to elect between suits.

In General.—The rule against splitting causes of action as embodied in this section, is neither harsh or inflexible. And its proper administration in cases like the one under consideration need never cause injustice, or deny the plaintiff any part of the fair and full determination of his every right. *Georgia Ry. & Power Co. v. Endsley*, 167 Ga. 439, 445, 145 S. E. 851.

Applied in *Hines v. Moore*, 168 Ga. 451, 452, 148 S. E. 162.

§ 4335. (§ 3741.) Former judgment.

I. IN GENERAL.

Applied in *Chastain v. Chastain*, 163 Ga. 69, 135 S. E. 439; *Atlanta v. Smith*, 165 Ga. 146, 140 S. E. 369; *Miller v. Phoenix Mutual Life Ins. Co.*, 163 Ga. 321, 147 S. E. 527.

Cited in *Lovett v. Barwick*, 39 Ga. App. 326, 147 S. E. 133.

II. PARTIES.

Third Parties Not Barred by Findings.—Since “in cases of attachment the claim may be interposed either before or after judgment” (§ 5120), where a claimant, in response to a levy of the execution in attachment, files his claim to property in the hands of a garnishee, he is not estopped by the previous judgment in favor of the plaintiff in attachment against the garnishee on the issue tried, on a traverse of his answer, to which such claimant was not a party nor is he bound merely by reason of the fact that during the trial of the traverse to the garnishee’s answer, he was physically present at the trial, but took no part therein. *Tarver v. Jones*, 34 Ga. App. 716, 131 S. E. 102.

IV. JUDGMENT AS ESTOPPEL.

Estoppel Generally.—The doctrine of estoppel by judgment has reference to previous litigation between the same parties based upon a different cause of action, and there is such an estoppel only as to such matters as were necessarily or actually adjudicated in the former litigation. *Farmer v. Baird*, 35 Ga. App. 208, 132 S. E. 260.

Where Motion to Set Aside Overruled.—The previous judgment of the trial court overruling a motion to set aside amounts to an adjudication that the original judgment could not be set aside for any reason that was or which might have been assigned, and that judgment renders a subsequent motion in arrest subject to the application of the doctrine of res judicata. *Farmer v. Baird*, 35 Ga. App. 208, 209, 132 S. E. 260.

§ 4336. (§ 3742). Judgment conclusive of what.

A judgment on affidavit of illegality of execution is a bar to equitable relief thereafter, under this section. *Cone v. Eubanks*, 176 Ga. 334, 145 S. E. 652.

Affirmance of the judgment without condition or direction left the trial court without jurisdiction to entertain or pass on a “special plea” filed after the judgment of affirmance. *Federal Investment Co. v. Ewing*, 166 Ga. 246, 142 S. E. 890.

Where a creditor obtains a personal judgment against a trustee on a note executed by the latter for goods, merchandise, and cash obtained and used for the benefit of his cestuis que trust, and on which a nulla bona has been returned, the creditor may proceed to subject the trust property to the payment of the judgment. The judgment against the trustee does not render the subsequent proceeding res adjudicata under this section. *Faulk v. Smith*, 168 Ga. 448, 148 S. E. 100.

Applied in *Burgamy v. Holton*, 165 Ga. 384, 390, 141 S. E. 42; *Lester v. Southern Security Co.*, 168 Ga. 307, 147 S. E. 529.

§ 4337. (§ 3743). Parol evidence admissible.

Cited in *Lovett v. Barwick*, 39 Ga. App. 326, 147 S. E. 133.

§ 4338. (§ 3744.) Effect of sustaining demurrer.

Dismissal of a petition on special demurrer not extend-

ing to the existence of the alleged cause of action was not a bar to a later suit by the plaintiff on the same cause. *Kennedy v. Ayers*, 166 Ga. 206, 142 S. E. 859.

Applied in *Cox v. Cox*, 163 Ga. 93, 135 S. E. 504.

ARTICLE 7

Of Set-Off and Recoupment

§ 4339. (§ 3745.) Set-off.

See catchline “Plea of Usury” under section 4348.

See notes to § 4350.

Under the Civil Code §§ 4339, 4340, 4341, any mutual demand between the parties existing at the commencement of the suit may be set off, and except as provided in § 4344, the debts may be separated and distinct and need not have arisen in mutual dealings. *Reynolds v. Speer*, 39 Ga. App. 570, 144 S. E. 358.

Agreements in More Than One Contract.—Where a plaintiff agreed to sell and also to install a lighting plant, set-off for improper installation will be allowed whether the contract to install was part of the contract of sale or was a separate contract. *Colt Co. v. Hiland*, 35 Ga. App. 550, 134 S. E. 142.

§ 4340. (§ 3746). What may be set off.

Indorsers who were sued jointly on note could set off account due to firm in which they were sole members. *Oliver v. Godley*, 38 Ga. App. 66, 73-4, 142 S. E. 566.

Applied in *Jefferson Standard Life Insurance Co. v. Rankin*, 39 Ga. App. 373, 147 S. E. 157.

§ 4341. (§ 3747). Mutual debts.

Set-off of Unliquidated Claim Due by Principal.—In an action on a note given by a principal and sureties, the defendants may set off unliquidated damages flowing from the breach of an independent contract between the plaintiff and the principal, and competent testimony tending to support this plea should not be repelled. *Webb-Harris Auto Co. v. Industrial Co.*, 164 Ga. 54, 137 S. E. 770.

§ 4344. (§ 3750.) Set-off against negotiable note.

Editor’s Note.—In *Fulton Nat. Bank v. Redmond*, 161 Ga. 204, 130 S. E. 568, the holdings of *Tinsley v. Beall*, 2 Ga. 134, and *Polk v. Stewart*, 144 Ga. 335, 336, 87 S. E. 21, as set out under this catchline in the Georgia Code of 1926, are quoted and approved.

Essential Elements of Plea.—See *Fulton Nat. Bank v. Redmond*, 161 Ga. 204, 130 S. E. 568, quoting the paragraph under this catchline in the Georgia Code of 1926.

Applied in *Pullen v. Powell*, 35 Ga. App. 333, 132 S. E. 922.

§ 4348. (§ 3754.) Effect of dismissal after set-off filed.

Plea of Usury.—Where in an action on a note the defendant pleaded that because of usury the plaintiff was entitled to recover only the sum which the defendant had obtained, the plea went merely to the justice in part of the plaintiff’s demand, and was not a plea of set-off, within the meaning of this section. *Pope v. Woolford Realty Co.*, 35 Ga. App. 284, 134 S. E. 174.

Cited in *Hayles v. So. Ry. (Ga.)*, 25 Fed. (2d) 758, 759.

§ 4350. (§ 3756.) Recoupment.

Editor’s Note—When Recoupment Allowed.—It is the recognized rule that, under a contractual relationship, the injured party may, where the rules of pleading permit, waive his rights under the contract, and recoup in tort, except where the breach complained of is simply the neglect of a duty expressly provided for by the contract itself. *Porter v. Davey Tree-Expert Co.*, 34 Ga. App. 355, 359, 129 S. E. 557.

But a cross-action based on a tort can not be so amended as to base it on a contract. *Tench v. Downey Hospital*, 36 Ga. App. 20, 135 S. E. 106.

For recoupment to lie, the plaintiff should be liable to the defendant under the contract sued upon. *Tench v. Downey Hospital*, 36 Ga. App. 20, 135 S. E. 106.

The suit having been brought for the purpose of setting aside a sheriff's sale on the ground of mistake or error in the sale as to the land actually sold, because of an omission from the advertisement of a part of the land that had been levied upon and which should have been sold, the defendant could not set up the defense of set-off or recoupment. *Frey v. Harry L. Winter Inc.*, 166 Ga. 453, 143 S. E. 902.

Persons Who May Recoup Damages.—See *Tennessee Chemical Co. v. George*, 161 Ga. 563, 131 S. E. 493, holding substantially the same as the first two sentences under this catchline in the Georgia Code of 1926.

Burden of Proof.—See *Porter v. Davey Tree-Expert Co.*, 34 Ga. App. 355, 356, 129 S. E. 557 holding the same as the paragraph under this catchline in the Georgia Code of 1926 and citing additional cases.

§ 4351. (§ 3757). Differs from set-off.

Cited in *Jordan v. Investment Corp. of Savannah*, 39 Ga. App. 144, 148, 146 S. E. 498.

§ 4352. (§ 3758.) For what it lies.

Necessary Allegations.—A plea in the nature of a recoupment for alleged overpayments which nowhere alleges upon what terms or conditions, if any, the alleged overpayments were made, fails to set out any right in the defendant to recover against the plaintiff. *Risener v. Kidd*, 35 Ga. App. 38, 132 S. E. 112.

ARTICLE 8

Of Limitation of Actions on Contracts

SECTION 1 •

Periods of Limitations

§ 4358. (§ 3764). Motions to set aside judgments and decrees, made when.

Applied in *Longshore v. Collier*, 37 Ga. App. 450, 140 S. E. 636.

§ 4359. (§ 3765). On specialties.

Instruments Governed by Section.—This section has been applied to contracts for the purchase of land, which would include contracts for the purchase of an interest in land, such as the purported lease here brought to be canceled. *Baxely Hardware Co. v. Morris*, 155 Ga. 359, 140 S. E. 869, citing *Elrod v. Bagley*, 150 Ga. 329, 103 S. E. 841.

When Suit Commences.—Filing of a petition to foreclose a mortgage, with issuance of rule nisi, unless followed by timely service, can not be treated as the commencement of the suit on the date of filing, so as to prevent attachment of the bar of limitation. *Simmerson v. Herringdine*, 166 Ga. 143, 142 S. E. 687.

Parties.—One who purchased the mortgaged property before the petition to foreclose was filed and the rule nisi issued, and who was not a party to that proceeding, was not bound by the judgment of foreclosure, and could set up its invalidity, and the bar of limitation on the trial of his claim interposed on levy of execution from that judgment. *Simmerson v. Herringdine*, 166 Ga. 143, 142 S. E. 687.

The statute of limitations, applicable to actions upon open account or for breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, does not apply to an action for the recovery of purchase-money under a contract under seal. *Whittle v. Nottingham*, 164 Ga. 155, 138 S. E. 62.

§ 4360. (§ 3766). Statutory rights.

In *Mobley v. Sasser*, 38 Ga. App. 383, 385, 144 S. E. 151,

it is said: "But counsel for the plaintiff in error urge that section 4360 of the Civil Code of 1910, which provides that 'All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues,' is authority for bringing such suits within twenty years after the right of action accrues. We can not agree with this contention. That this section is not applicable to the cases under consideration is shown by the decision of Judge Sibley and the Georgia cases he cites in *Anderson v. Anderson*, 23 Fed. (2d), 331."

§ 4361. (§ 3767). Simple contracts.

Applied in *Buchanan v. Huson*, 39 Ga. App. 734, 735, 148 S. E. 345.

§ 4362. (§ 3768.) Open accounts.

Instances Where Section Not Applied.—This section does not apply to the right of a road commissioner to collect salary that is due him. *Sammons v. Glascock County*, 161 Ga. 893, 131 S. E. 881.

This section does not apply to a widows application for a year's support. The right to a year's support is not an open account, nor is it based upon a contract, or an implied assumpsit or undertaking. *Bacon v. Bacon*, 37 Ga. App. 171, 139 S. E. 111.

Applied in *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S. E. 826.

§ 4363. (§ 3769). Mutual accounts.

Applied.—Under application of this section, a plea containing a statement of an account by the defendant against the plaintiff, which did not allege that the credit therein extended was on the strength or basis of credit extended by the plaintiff to the defendant, when considered with reference to the allegations of the petition, which contained a statement of account in favor of the plaintiff against the defendant, and which did not allege that the credit extended by the plaintiff was on the strength of mutual dealings between the parties, was insufficient to set up such mutual account as to which the statute of limitations would not begin to run until the date of the last item. *Bird v. Chander*, 166 Ga. 707, 144 S. E. 265.

§ 4369. (§ 3775.) Limitations in equity.

Injunction against Paving Ordinance.—Where the owner of property stood by and allowed street improvements to be carried to completion, and received the benefits of the work and enjoyed them for several years, without taking any legal proceedings to prevent the expenditure of the money when the work was being carried on; he is estopped from enjoining a sale of his property to pay assessments. *Raines v. Clay*, 161 Ga. 574, 578, 131 S. E. 499.

SECTION 2

Exceptions and Disabilities

§ 4374. (§ 3779.) Persons excepted.

Applied in *Stonecypher v. Coleman*, 161 Ga. 403, 131 S. E. 75.

§ 4378. (§ 3783.) Absence from state of defendant.

The Removal of a Debtor.—In order for the removal of a debtor from this State to suspend the operation of the statute of limitations, it must be accompanied by an intention to change his legal residence or domicile. *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S. E. 826.

Ownership of Property within State.—The fact that the defendant might have owned property within the State during the period of his nonresidence does not operate to prevent the tolling of the statute. *Kimball v. Kimball*, 35 Ga. App. 462, 133 S. E. 295.

§ 4380. (§ 3785). Fraud.

When Statute Applicable.—"This statute has been considered applicable where legal relief because of fraud was sought, *Kirkley v. Sharp*, 98 Ga. 484, 25 S. E. 562; and also equitable, *Short v. Mathis*, 107 Ga. 807, 33 S. E. 694. It applies, also, where the cause of action was not an original fraud, but where its existence was fraudulently concealed. The fraud in the latter instance must be an actual moral fraud, and not a mere constructive one. *Anderson v. Foster*, 112 Ga. 270, 37 S. E. 426; *Maxwell v. Walsh*, 117 Ga. 467, 43 S. E. 704. The statute doubtless has the same meaning when fraud is the cause of action." *Anderson v. Gailey* (Ga.), 33 Fed. (2d), 589, 592.

Statute held not applicable to suit by receiver for misconduct and negligence of directors of National Bank in making and handling loans. *Anderson v. Gailey* (Ga.), 33 Fed. (2d), 589.

Neglect, etc., of Agent.—Where unskillfulness and neglect in an agent is the cause of action, the unskilful act itself sets the statute in motion, and not the occurrence of the special damage, and ignorance of it by the plaintiff is not important. *Anderson v. Gailey* (Ga.), 33 Fed. (2d), 589, 593.

§ 4381. (§ 3786). Nonsuit or dismissal.

I. EDITOR'S NOTE AND GENERAL CONSIDERATION.

Construction and Application.—This section is a remedial statute and is to be liberally construed; and while the second suit must be substantially the same cause of action, it does not have to be a literal copy of that dismissed. *Cox v. Strickland*, 120 Ga. 104(5), 47 S. E. 912, 1 Ann. Cas. 870; *Gust v. Atlantic Coast Line R. Co.*, 37 Ga. App. 102, 139 S. E. 97.

II. PARTICULAR SUITS.

Certiorari.—Where a valid certiorari has been dismissed, it may be renewed within six months under the provisions of this section. *Gragg Lumber Co. v. Collins*, 37 Ga. App. 76, 77, 139 S. E. 84.

III. PARTIES AND CAUSES OF ACTION MUST BE THE SAME.

Within the purview of the statute, the case under consideration is substantially the same as the one dismissed, and the court erred in sustaining the general demurrer and dismissing the petition. *Guest v. Atlantic Coast Line R. Co.*, 37 Ga. App. 102, 139 S. E. 97.

Where a petition seeks to renew a former suit within six months of the dismissal of the suit, which would otherwise be barred by the statute of limitations, as provided in this section and section 5626 of the Code, it must appear from the renewal petition that the new suit is substantially the same cause of action as that of the former suit. *Barber v. City of Rome*, 39 Ga. App. 225, 146 S. E. 856.

SECTION 3

New Promise

§ 4384. Discharge in bankruptcy; new promise.

Applied in *Massey v. Winchester*, 38 Ga. App. 186, 143 S. E. 617.

§ 4386. (§ 3790). Effect of new promise.

If pending a suit for injury to reputation, which action was barred by limitation when commenced, the parties entered into an agreement for payment of money in settlement of the suit and of all other demands, a right of action on such agreement would be a new and distinct cause that could not be added by amendment to the suit for the tort. *Heath v. Philpot*, 165 Ga. 844, 142 S. E. 283.

Applied in *Cameron v. Meador-Pasley Company*, 39 Ga. App. 712, 148 S. E. 309.

CHAPTER 8

Of Breach and Damage

§ 4390. (§ 3794.) Liquidated damages.

In Absence of Agreement Fixing Damages.—Where no agreement fixing the amount of damages in case of the breach of a contract is embraced in the contract itself, the damages accruing to either party by reason of a breach are such as will compensate him for the injury sustained. *Spalding Constr. Co. v. Simon*, 36 Ga. App. 723, 725, 137 S. E. 901.

Applied in *Colt Co. v. Hiland*, 35 Ga. App. 550, 134 S. E. 142; *Standard Motors Finance Co. v. O'Neal*, 35 Ga. App. 727, 134 S. E. 843; *Southwest Georgia Development Co. v. Griffin*, 38 Ga. App. 276, 143 S. E. 784.

Cited in *Endsley v. Ga. Ry. & Power Co.*, 37 Ga. 439, 442, 140 S. E. 386.

§ 4391. (§ 3795.) Penalties.

Cited in *Standard Motors Finance Co. v. O'Neal*, 35 Ga. App. 727, 134 S. E. 843.

§ 4392. (§ 3796.) Expense of litigation.

Attorney's Fees.—Acting in bad faith, or being stubbornly litigious, or causing the plaintiff unnecessary trouble or expense might in a particular case suffice to authorize a finding for attorney's fees. *O'Neal v. Spivey*, 167 Ga. 176, 177, 145 S. E. 71.

Under the evidence in this case the jury was authorized to find that the defendant acted in bad faith and was stubbornly litigious and caused the plaintiff unnecessary trouble and expense, even if he had not paid the attorney it was necessary for him to employ. In the absence of any agreement as to the amount of the fee, the attorney is entitled to compensation quantum meruit. *O'Neal v. Spivey*, 167 Ga. 176, 177, 145 S. E. 71.

In an action to recover damages for breach of contract of sale by the buyer, including expenses incurred by the buyer in carrying same out, and a cash payment on the purchase money, and for cancellation of the contract, this court held that attorneys' fees might be allowed by the jury where the defendant had acted in bad faith and caused the plaintiff unnecessary trouble and expense. *Mendel v. Leader*, 136 Ga. 442, 71 S. E. 753. By parity of reasoning, where suit is brought by the maker to cancel a note and deed to secure the same, against the defendant who, for a valuable consideration, had agreed to pay off the note and cancel the same of record, and who had paid off the note but who had taken a transfer to himself of the note and of the deed to secure it, and who had refused, upon demand, to surrender the note and cancel the deed, the jury trying the case might allow the attorneys' fees for such breach of his contract by the defendant, where he had acted in bad faith, and caused the plaintiff unnecessary trouble and expense. *Mendel v. Leader*, supra. *Felder v. Paulk*, 165 Ga. 135 S. E. 873.

§ 4393. (§ 3797.) Exemplary damages.

Strict Construction.—In *Copeland v. Dunehoo*, 36 Ga. App. 817, 821, 138 S. E. 267, it was said: "A strong word is 'never', yet we must construe this section in the light of all others relating to the same subject, and, on so construing it, we think that while the rule stated therein is a very strict and well-nigh universal one, it is still not a rule without any exception whatever. It seems that at least one exception is found in the provision for smart-money as contained in section 299."

§ 4394. (§ 3798.) Remote damages.

Damages which are the legal and natural result of the breach are not necessarily too remote merely because they may be to some extent contingent. *Walker v. Jenkins*, 32 Ga. App. 238(5), 123 S. E. 161; *Reynolds v. Speer*, 38 Ga. App. 570, 144 S. E. 358.

Applied in *Bank v. Riehle*, 36 Ga. App. 470, 137 S. E. 642; *Conrier-Herald Pub. Co. v. American Type Founders Co.*, 34 Ga. App. 473, 130 S. E. 80; *Gary v. Central of Ga. Ry. Co.*, 37 Ga. App. 744, 750, 141 S. E. 819.

§ 4395. (§ 3799.) Damages contemplated by parties.

Applied in *Colt Co. v. Hiland*, 35 Ga. App. 550, 134 S. E. 142; *Reynolds v. Speer*, 38 Ga. App. 570, 144 S. E. 358.

Stated in *Neal v. Medlin*, 36 Ga. App. 796, 797, 138 S. E. 254.

§ 4396. (§ 3800.) Interest.

Question of Interest within Discretion of Jury.—Whether interest from the time of the breach shall be added to the damages is within the discretion of the jury. *Black v. Automatic Sprinkler Co.*, 35 Ga. App. 8, 131 S. E. 543.

§ 4398. (§ 3802.) Plaintiff bound to lessen damage.

This section is applicable only where the damages can be lessened by reasonable efforts and expense. *Reid v. Whisenant*, 161 Ga. 503, 510, 131 S. E. 904.

Applied in *Pullman Co. v. Strang*, 35 Ga. App. 59, 80, 132 S. E. 399; *Evans v. Central of Georgia Ry. Co.*, 38 Ga. App. 146, 142 S. E. 909.

Quoted in part in *Western, etc., Railroad v. Townsend*, 35 Ga. App. 70, 135 S. E. 439.

§ 4399. (§ 3803.) Discretion of jury as to damages.

Applied in *State Highway Board v. Willcox*, 168 Ga. 833, 896, 149 S. E. 182; *Willcox v. State Highway Board*, 38 Ga. App. 373, 374, 144 S. E. 214.

§ 4400. (§ 3804.) On covenants of warranty to land.

Stated in *Neal v. Medlin*, 36 Ga. App. 796, 138 S. E. 254.

NINTH TITLE

Of Torts, or Injuries to Persons or Property

CHAPTER 1

General Principles, and Herein of Fraud and Deceit

§ 4403. (§ 3807.) What are torts.

Paragraph Two—Safe-keeping of Convicts.—If county commissioners failed to perform the public duty resting upon them to erect suitable quarters for the safe-keeping and support of the county convicts under their control, they would be liable, if at all, for only such special damages as the plaintiff sustained by reason of their infraction of this public duty. *McConnell v. Floyd County*, 164 Ga. 177, 137 S. E. 919.

Paragraph Three—Legal Wrong.—While it has been held that the breach of an unexpressed but implied duty arising out of a contract gives the injured party the right of election as to his remedy, so that he may rely either upon his right under the contract or proceed for damages as in case of tort, still, in order for such a breach of an implied duty to give rise to a right of election on the part of the complainant, there must be a legal wrong committed upon the person or property of the complaining party. *Varn Turpentine, etc., Co. v. Allen*, 38 Ga. App. 408, 144 S. E. 47.

Section Quoted and applied in *Strachan Shipping Co. v. Hazlip-Hood Cotton Co.*, 35 Ga. App. 94, 132 S. E. 454.

§ 4405. (§ 3809.) Breach of legal duty gives action.

Fraud and Deceit.—Where parties conspire to defraud

the plaintiff or make a willful misrepresentation of material fact to induce the plaintiff to act to his injury, an action for deceit will lie. The directors of a corporation may be liable for false statements in regard to the affairs of the corporation, as for fraud and deceit. *Hines v. Wilson*, 164 Ga. 888, 139 S. E. 802.

§ 4407. (§ 3811.) Cases of election.

Stated in *Tennessee Chemical Co. v. George*, 161 Ga. 563, 564, 131 S. E. 493.

Applied in *Perry v. Griffin*, 39 Ga. App. 170, 146 S. E. 567.

§ 4408. (§ 3812.) Privity.

Applied in *Strachan Shipping Co. v. Hazlip-Hood Cotton Co.*, 35 Ga. App. 94, 98, 132 S. E. 454; *King Hardware Co. v. Ennis*, 39 Ga. App. 362, 147 S. E. 119.

§ 4409. (§ 3813.) Fraud and damage give action.

Cited in *Hoffman, v. Lynch (Ga.)*, 23 Fed. (2d) 518.

§ 4410. (§ 3814.) Deceit.

Actionable Misrepresentation—When Vendee Need Only Believe.—Where the basis upon which the contract was entered upon lies in the existence or nonexistence of certain material facts, the verity of which needs must be ascertained from the statement of one acquainted with such facts, each of the contracting parties has a right to rely upon the truth of the other's statements with reference thereto, when such statements relate to matters apparently within the knowledge of the party asserting them; and to do this without checking up the statements with the declarations of other and different persons, in order, by such an investigation, to test their probable truth. *Deibert v. McWhorter*, 34 Ga. App. 803, 804, 132 S. E. 110.

Mere Concealment Provision Charged.—Where the plaintiff is proceeding ex delicto for deceit, it is not cause for a new trial to the defendant that the judge in his charge to the jury, which included this section, gave that part of the section dealing with "mere concealment." *Deibert v. McWhorter*, 34 Ga. App. 803, 132 S. E. 110.

In any suit sounding in tort for damages on account of actual fraud, the gist of the action is the purpose and design to deceive. Citing 10 *Michie's Enc. Dig.* 409. *Penn Mutual Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 511, 144 S. E. 400.

§ 4413. (§ 3817.) By wife, servant, etc.

Where Public Officer Is Employed.—If a public officer is employed and paid by the master to perform certain acts for him, and if in the prosecution and scope of the master's business such officer commits a tort, the master is liable therefor. *Massachusetts Cotton Mills v. Hawkins*, 164 Ga. 594, 139 S. E. 52.

So where a manufacturing company employs and pays a public officer to keep order on its premises, protect its property, and make arrests of persons violating the State laws, if such servant in the prosecution of his duties as such servant and within the scope of the master's business commits a tortious act, the master is liable for the servant's tort. *Massachusetts Cotton Mills v. Hawkins*, 164 Ga. 594, 139 S. E. 52.

The owner of an automobile driven by another is not liable for the act of a servant who exceeds his authority by permitting a third person to ride with him. *Greeson v. Bailey*, 167 Ga. 638, 146 S. E. 490; *Thomas v. Bailey*, 167 Ga. 638, 146 S. E. 490.

A husband, under this section, and existing statutes enlarging the rights and functions of married women, is not liable for an independent tort committed by the wife in the operation of an automobile not furnished by him to the wife, and not used in the husband's business, but operated without his consent, command, or participation in any way. *Curtis v. Ashworth*, 165 Ga. 782, 142 S. E. 111.

Service of Process.—In this State a husband now is liable for the torts of his wife only when they are committed by her in the capacity of agent; and where it is sought to hold the husband liable for some wrong committed by her within the scope of her agency, a suit may be maintained against the husband without joining the wife as a party defendant. If both are named as defend-

ants, but the wife is not served, such lack of service as to the wife is no cause for dismissing the suit as to the husband. *Miller v. Straus*, 38 Ga. App. 781, 145 S. E. 501.

Purely Personal Quarrels.—Where it appeared that the real purpose of the person assaulted in approaching the agent of a railroad company at his place of business was solely to renew a mere personal quarrel between the plaintiff and the agent, the plaintiff being under notice that the agent was acting according to his instructions, the railroad company had no concern in what passed between them, and the trial judge did not err in granting a nonsuit. *Dugger v. Central*, etc., R. Co., 36 Ga. App. 782, 783, 138 S. E. 266. But see the dissenting opinion of Mr. Justice Hines in *Holliday v. Merchants, etc., Transp. Co.*, 161 Ga. 949, 964, 132 S. E. 210.

Application of Section to Railway Cases.—While this code section has been applied in numerous railway cases, it appears that the rule of liability on the part of railway companies is not wholly fixed and determined by the provision of law quoted, but is enlarged or modified by the provisions of section 2780. *Moore v. DeKalb Supply Co.*, 34 Ga. App. 375, 377, 129 S. E. 899.

Applied in *Massachusetts Cotton Mills v. Byrd*, 38 Ga. App. 241, 243, 143 S. E. 610.

Cited in *Fisher v. Georgia Northern R. Co.*, 35 Ga. App. 733, 134 S. E. 827.

§ 4414. (§ 3818.) By employee.

In General.—Where one "contracts with an individual exercising an independent employment, for him to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods and not subject to the employer's control or orders except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or his servants." *Zurich General Acci., etc., Ins. Co. v. Lee*, 36 Ga. App. 248, 136 S. E. 173, quoting from *Quinan v. Standard Fuel Supply Co.*, 25 Ga. App. 47, 102 S. E. 543.

Same—Test for Determining Relationship.—Under the section and the decisions relating thereto, the test to be applied, in determining the relationship of the parties under a contract, lies in whether it gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. *Zurich General Acci., etc., Ins. Co. v. Lee*, 36 Ga. App. 248, 136 S. E. 173, citing 39 C. J. p. 1322, section 1525; 42 A. L. R. 616, III a.

One operating a collection agency whereby he undertakes the collection of debts on a commission, and whose services are in no wise subject to the employer's control or orders as to the time, manner, or method of their execution, does not occupy the status of a servant, but must be taken as exercising an independent business. Where one contracts with an individual thus exercising an independent business, for him to do a work not in itself unlawful or attended with danger to others, the employer is not liable for the wrongful or negligent acts of the independent contractor or his servants. *Calvert v. Atlanta Hub Co.*, 37 Ga. App. 295, 139 S. E. 917.

No Ratification Shown.—The facts of the instant case show no such ratification of the alleged tort by the defendant as would render it liable under sections 4415 and 4416. *Calvert v. Atlanta Hub Co., Inc.*, 37 Ga. App. 295, 139 S. E. 917.

Applied in *Calvert v. Atlanta Hub Co., Inc.*, 37 Ga. App. 295, 139 S. E. 917; *Davis v. Starrett Bros.*, 39 Ga. App. 422, 428, 147 S. E. 530.

Cited in *Poss Brothers Lumber Co. v. Haynie*, 37 Ga. App. 60, 62, 139 S. E. 127; *Hughes v. Weekley Elevator Co.*, 37 Ga. App. 130, 132, 138 S. E. 633.

§ 4419. (§ 3823.) Frauds by acts or silence.

Applied in *May v. Yearty*, 34 Ga. App. 29, 128 S. E. 67; *Burton v. Parris*, 168 Ga. 407, 148 S. E. 11.

Cited in *Watkins Co. v. Rivers*, 37 Ga. App. 560, 140 S. E. 770.

§ 4420. (§ 3824.) Owner bound to keep premises safe, when.

Editor's Note.—It would seem that the degree of diligence required, under the section, in keeping the premises safe, does not consist in either slight diligence or of extraordinary diligence, but rather consists of ordinary care, such as a prudent householder might reasonably be expected to exercise. See *Cuthbert v. Schofield*, 35 Ga. App. 443, 133

S. E. 303. This rule is not in conflict with those cases, of which the case of *Fulton Ice, etc., Co. v. Pece*, 29 Ga. App. 507, 116 S. E. 57, is typical, in which the owner or occupier of land is required, under this section, to exercise extraordinary diligence towards an invitee, in discovering and repairing defects in the premises entered upon. In the *Pece* case, supra, the object causing the injury was not alleged to have been "apparently sound and in safe condition," but was shown to be old and worn. In the *Cuthbert* case the owner was without actual knowledge of the defect, and there was nothing to indicate the propriety or necessity of making an inspection. Ordinary diligence would certainly not require an inspection where there is no reason to think an inspection necessary. See 29 Corpus Juris 427(2). Besides the rule of inspection might be applied with a much greater degree of rigidity in cases like the *Pece* case, supra, relating to dangerous instrumentalities.

The duty to an invitee seems to be to exercise ordinary care to keep the premises safe, not reasonably safe. *Western, etc., Railroad v. Hetzel*, 38 Ga. App. 556, 564, 144 S. E. 506.

Assault by Ball Player.—Where a baseball player employed by the proprietor of a baseball park left his position upon the grounds and entered the grandstand, and there assaulted a spectator because the latter had "ragged" him or criticized his playing, the assault was not committed within the scope of his employment nor in the prosecution of his master's business, but was his personal act in resenting a real or fancied insult. *Atlanta Baseball Co. v. Lawrence*, 38 Ga. App. 497, 144 S. E. 351.

There being nothing in the petition to show that the assault complained of, or anything of such character, could or should have been anticipated by the defendant, or that the defendant failed to do anything that it should have done for the safety or protection of the plaintiff as its invitee, the petition fails to show negligence, and the general demurrer thereto should have been sustained. *Atlanta Baseball Co. v. Lawrence*, 38 Ga. App. 497, 144 S. E. 351.

Erroneous Charge as to Duty to Invitee.—A charge to the jury to the effect that such a landowner is under the duty to see that the premises are "in such condition that the person invited may approach and remain thereon in safety," was error, in that the court, instead of charging, according to the true rule, that the duty of the landowner is to keep his premises safe, placed upon the landowner the heavier burden of seeing that the person on the premises remained there in safety. *Southern R. Co. v. Bottoms*, 35 Ga. App. 804, 134 S. E. 824.

Applied in *Russell v. Dannenberg Co.*, 34 Ga. App. 792, 132 S. E. 230; *Hickman v. Toole*, 35 Ga. App. 697, 134 S. E. 635.

CHAPTER 2

Of Injuries to the Person

ARTICLE 1

Physical Injuries

§ 4422. (§ 3826.) Physical injuries.

Charge When Suit Based upon Negligence Alone.—In a suit for personal injuries based upon negligence alone, it is inapt to give in charge this section. *Georgia R. etc., Co. v. Bryans*, 35 Ga. App. 713, 134 S. E. 787; *Hirsch v. Plowden*, 35 Ga. App. 763, 134 S. E. 833.

§ 4423. (§ 3827.) What is tort on a person.

Humiliation by deposit of filth by horse on woman in circus; cause of action stated. *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S. E. 680.

Any unlawful touching of a person's body, although no actual physical hurt may ensue therefrom, yet, since it violates a personal right, constitutes a physical injury to that person. The unlawful touching need not be direct, but may be indirect as by the precipitation upon the body of a person of any material substance. *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S. E. 680.

The court having properly instructed the jury as to

the relative rights of the parties under the pleadings and the evidence, it was not error to fail to give in charge the definition of a tort as contained in this section. *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S. E. 689.

§ 4424. (§ 3828.) Recovery for homicide, when.

Recovery for Death of Child—Dependency of Mother.—In order for a mother to recover under the provisions of this section for the homicide of her child, it must appear not only that the child contributed substantially or materially to her support, but also that she was dependent upon it to an appreciable or material degree therefor. *Owens v. Anchor Duck Mills*, 34 Ga. App. 315, 129 S. E. 301. When mother was inmate of Georgia State Sanitarium, as an insane person long prior to, and at the time of homicide, she was not dependent upon the said child. Id.

Same—Measure of Damages.—Where the defendant is liable and there is no reason to reduce the damages, the plaintiff is entitled to recover the value of the decedent's life. *Western, etc., Railroad v. Reed*, 35 Ga. App. 538, 546, 134 S. E. 134.

1924 Amendment—Constitutionality.—The amendment of 1924 adding the words "minor or sui juris" after the words "child or children" is constitutional. *Peeler v. Central, etc., R. Co.*, 163 Ga. 784, 137 S. E. 24.

Same—Purpose.—It was the purpose of the General Assembly in the passage of this act to exclude dependency as a prerequisite essential to a child's right to recover for the homicide of a parent; and the provision of the act entitling a child, whether minor or sui juris, to recover damages for the homicide of its parent, properly construed, makes the question whether the child is dependent upon such parent in any respect wholly immaterial. *Peeler v. Central, etc., R. Co.*, 163 Ga. 784, 137 S. E. 24.

Same—Action by Adult Child under Section Prior to Amendment.—An adult child cannot recover for the homicide of his widowed mother, where such homicide occurred prior to the amendment of August 18, 1924. *Thompson v. Georgia R., etc Co.*, 163 Ga. 598, 136 S. E. 895. See also *Peeler v. Central, etc., R. Co.*, 163 Ga. 784, 137 S. E. 24.

Homicide of Son.—Under this section, a mother has no right to sue for the homicide of her son where he leaves a wife or child, and, where she does so sue, her petition must affirmatively allege that her son left no wife or child, or it is subject to be dismissed on general demurrer. *Butts v. City of Moultrie*, 39 Ga. App. 685, 148 S. E. 273.

Homicide of Mother.—Under this section, a child may recover for the homicide of his mother (the mother leaving no husband or other children) without showing that he was dependent upon her and that she contributed to his support. It follows that in this case the trial judge erred in charging the jury that before the plaintiff could recover he must prove that he was dependent upon his deceased mother and that she contributed to his support. However, that error was cured by a subsequent charge which informed the jury of the court's error and gave the correct law on the subject. *Petty v. Louisville & Nashville Railroad Co.*, 39 Ga. App. 689, 148 S. E. 303.

§ 4425. (§ 3829.) Definition of terms in preceding section.

See notes to § 4503.

Section controlling principle in *Leslie v. Macon*, 35 Ga. App. 484, 133 S. E. 638. See also fairly complete list of cases there cited as applying the section.

§ 4426. (§ 3830.) Diligence of plaintiff.

See notes to § 2781.

Charge of Section.—A charge embodying, substantially, the language of the section, was not erroneous as impressing the jury that the plaintiff was under a duty to avoid the consequences of the defendant's negligence, though such negligence was not known or apparent to her, or was reasonably to be apprehended by her, and that if she didn't avoid it she could not recover. *Howard v. Georgia, Ry., etc., Co.*, 35 Ga. App. 273, 133 S. E. 57. In this connection, see also, *Central, etc., Ry. Co. v. Barnett*, 35 Ga. App. 528, 134 S. E. 126.

Same—When Judge Must Give.—Where the pleadings and the evidence make an issue as to the plaintiff's diligence and the defendant's negligence, it is error for the court to omit an instruction to the jury embodying the principle expressed in the code section, even in the absence of any request to do so. *Georgia R., etc., Co. v. McElroy*, 36 Ga. App. 143, 144, 136 S. E. 85.

Contributory Negligence.—Where by the exercise of ordinary care the deceased could have avoided the consequence to himself caused by the defendant's negligence, a nonsuit was properly ordered. *Little v. Rome R., etc., Co.*, 35 Ga. App. 482, 483, 133 S. E. 643; as to the plaintiff's duty generally in this connection, see *Atlantic Coast Line R. Co. v. Anderson*, 35 Ga. App. 292, 133 S. E. 63.

Same—Instruction to Jury.—It is improper to instruct the jury that the plaintiff must have been free from negligence before it can recover. *Lime-Cola Bottling Co. v. Atlanta, etc., R. Co.*, 34 Ga. App. 103, 128 S. E. 226.

Same—Same—Rule as to Contributory Negligence and Diminution of Damages Confused.—An instruction to the jury, in which the rule expressed in the section which precludes a recovery where the plaintiff has failed to exercise ordinary care, is confused with the rule as to comparative negligence and diminution or apportionment of damages, is erroneous. *Brown v. Meikleham*, 34 Ga. App. 207, 128 S. E. 918.

One who knowingly and voluntarily takes a risk of injury, the danger of which is so obvious that no person of ordinary prudence would have subjected himself thereto, can not hold another liable for damages for injuries thus occasioned. *Culbreath v. Kutz Co.*, 37 Ga. App. 425, 432, 140 S. E. 419.

Applied in *Peeples v. Louisville & Nashville R. Co.*, 37 Ga. App. 87, 88, 139 S. E. 85; *Mills v. Barker*, 38 Ga. App. 734, 736, 145 S. E. 502.

§ 4427. (§ 3831.) Malpractice of surgery and medicine.

Charging Section.—In omitting the word "skill" and using different language from that of the Code, the trial judge, in view of the evidence and of the remainder of his charge to the jury, did not commit an error which would entitle the plaintiff to a new trial, when, immediately after charging the rule laid down in the Code, that a surgeon must exercise "a reasonable degree of care and skill", he charged that the plaintiff would not be entitled to recover if the defendant exercised "all ordinary and reasonable care, diligence, and prudence." *McLendon v. Daniel*, 37 Ga. App. 524, 141 S. E. 77.

Applied in *Hughes v. Weaver*, 39 Ga. App. 597, 148 S. E. 12.

ARTICLE 2

Injuries to Reputation

SECTION 1

Of Libel and Slander

§ 4428. (§ 3832.) Libel.

The fact that the defendant's newspaper published the alleged libelous charge as a statement made by another person constitutes no justification. *Kirkland v. Constitution Publishing Co.*, 38 Ga. App. 632, 634, 144 S. E. 821.

§ 4429. (§ 3833.) Malice.

In General.—It is slanderous per se to falsely utter and publish a statement, with reference to a married woman, to the effect that she is the common wife of her husband and another man. Malice and damage will be inferred. *Barker v. Green*, 34 Ga. App. 574, 130 S. E. 599.

Words Spoken in Jest and Retraction as Defense.—Malice is an "aggravating circumstance." The existence of malice would not be conclusively rebutted by proof of a retraction, accompanied by an explanation that the words were spoken merely in jest, and only for the purpose of "teasing" the person to whom they were addressed. *Barker v. Green*, 34 Ga. App. 574, 130 S. E. 599.

Erroneously Charged—Corrected in Time.—It was not cause for a new trial to the losing party that the presiding judge gave in charge to the jury all of the section, when immediately thereafter he expressly informed them that a part of the section was not applicable, and correctly instructed them

as to which part was applicable. *Barker v. Green*, 34 Ga. App. 574, 130 S. E. 599.

§ 4432. (§ 3836). What privileged.

Cited in *Alumbaugh v. State*, 39 Ga. App. 559, 564, 148 S. E. 622.

§ 4433. (§ 3837.) Slander.

In General—Prima Facie Case.—Where the statements tended to show affliction with a contagious disease, and calculated to injure the plaintiff in her profession, and the evidence did not affirmatively show that the alleged slanderous statements were privileged; a prima facie case for the plaintiff was made out, and the court erred in granting a nonsuit. *Brown v. McCann*, 36 Ga. App. 812, 138 S. E. 247.

§ 4436. (§ 3840). Privileged communications.

A newspaper is not privileged, under this section, or otherwise, to publish a libelous charge about a public official as respects the conduct of his office. *Kirkland v. Constitution Publishing Co.*, 38 Ga. App. 632, 144 S. E. 821.

SECTION 2

Malicious Prosecution

§ 4440. (§ 3844.) Probable cause.

Cited in *Norman v. Young*, 35 Ga. App. 221, 132 S. E. 414.

§ 4444. (§ 3848). Malice inferred, when.

Although in this action for alleged malicious use of legal process the plaintiff alleged that process of garnishment, based on an action against him by the defendant, was instituted by the latter maliciously and without probable cause, with knowledge that there was a good defense to the original action and with the purpose of harassing him into making a settlement of that action, the petition failed to set forth any fact that would authorize the conclusion that the garnishment was sued out maliciously and without probable cause. *Hallman v. Ozburn*, 38 Ga. App. 514, 144 S. E. 344.

§ 4446. (§ 3850.) When the right accrues.

Abandonment of Prosecution.—While the procuring from the committing court of an order discharging the defendant in a warrant amounts to a termination of the prosecution when no further action is taken, the mere allegation of such discharge, without at least showing in general terms that the prosecution has been terminated, does not meet the requirements of this section. *Rogers Co. v. Murray*, 35 Ga. App. 49, 50, 132 S. E. 139.

ARTICLE 3

Other Torts to the Person

SECTION 1

False Imprisonment

§ 4448. (§ 3852). Under warrant.

Applied in *Teasley v. Nelson*, 39 Ga. App. 773, 148 S. E. 534.

SECTION 3

Nuisances and Other Injuries to Health

§ 4457. (§ 3861). What is a nuisance.

A filling-station is not per se a nuisance. *Standard Oil Co. v. Kahn*, 165 Ga. 575, 141 S. E. 643.

Mere apprehension of inconveniences arising from a filling-station in course of construction, the same being for a lawful business use, is not sufficient to authorize an injunction. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126; *Standard Oil Co. v. Kahn*, 165 Ga. 575, 581, 141 S. E. 643.

Undertaking Establishment.—Interlocutory restraint of maintenance of undertaking establishment in residential and school district, affirmed. *Harris v. Sutton*, 168 Ga. 565, 148 S. E. 403.

§ 4460. (§ 3864.) Sale of unwholesome provisions.

Pleadings.—For a case substantially following the case cited under this catchline in the Georgia Code of 1926, see *Copeland v. Curtis*, 36 Ga. App. 255, 136 S. E. 324.

Liability of Original Vendor.—The general rule is that where personal property sold by A to B is resold by B to C, there is no implied warranty. *Young v. Certainteed Products Corp.*, 35 Ga. App. 419, 133 S. E. 279. Whether the rule is applicable under this section—Quaere.

SECTION 4

Of Indirect Injuries to the Person

§ 4469. (§ 3873). Procurer of wrong is joint wrongdoer.

One who by advice, counsel, or command, procures another to commit a wrong may be held liable equally with the actual perpetrator, and may be sued separately or jointly with him; and this is true irrespective of whether there exists between the two any such relation as master and servant, or other relation giving to the one authority over the other. *Wilder v. Gardner*, 39 Ga. App. 608, 147 S. E. 911.

ARTICLE 1

To Real Estate

CHAPTER 3

Of Injuries to Property

§ 4470. (§ 3874). Interfering with enjoyment of.

Operation of Engines.—Under this provision and 4474 no presumption does or can arise, because the defendant ran and operated its engines, etc., on the railroad tracks on plaintiff's land, where dust and cinders affected the cleanliness of his refining plant and endangered his building by fire, and did the other acts complained of, that any of these acts were done lawfully. *Williams v. Seaboard Air-Line Railway Co.*, 165 Ga. 655, 660, 141 S. E. 805.

§ 4471. (§ 3875.) Right or possession.

Liability of Lessee to Subsequent Lessee.—Where the owner of certain realty leased the same to a tenant, and before the expiration of the term of the tenancy executed a lease of the same premises to a second lessee, the latter, upon the expiration of the time of the former tenancy, was

vested with the right of possession of the property; and where the former tenant refused to surrender possession, the second tenant could maintain an action for damages against the former tenant for withholding the right of possession. *Anderson v. Kokomo Rubber Co.*, 161 Ga. 842, 132 S. E. 76. The Supreme Court, in this case, reversed the Court of Appeals holding in the same case, *Kokomo Rubber Co. v. Anderson*, 33 Ga. App. 241, 125 S. E. 783. See under catch-line "Lessee Not Liable to Subsequent Lessee," Georgia Code of 1926.

§ 4473. (§ 3877). Bare title.

Applied in *Citizens, etc., Bank v. Edelstein*, 38 Ga. App. 56, 142 S. E. 307.

§ 4474. (§ 3878). Disputed possession.

See notes to § 4470.

§ 4475. (§ 3879). Watercourses.

Applied.—The case involving a special covenant, the general principles embodied in § 3633 and this section relating to rights of upper and lower proprietors on unnavigable streams, have no application. *Peebles v. Perkins*, 165 Ga. 159, 140 S. E. 360.

§ 4479. (§ 3883.) Slander of title.

When Right of Action Accrues.—In an action for false, slanderous, and malicious words impugning the title to the plaintiff's lands, the right of action accrues to the plaintiff upon the doing of the act complained of, just as in injuries to personal reputation. *King v. Miller*, 35 Ga. App. 427, 133 S. E. 302.

ARTICLE 3

Injuries to Personalty Generally

§ 4483. (§ 3887). Trover.

Cited in *Hoffman v. Lynch* (Ga.), 23 Fed. (2d) 518.

§ 4484. Defenses in trover cases.

This section is sufficiently broad to include not only the immediate assignee of the vendor, but also the assignee of such assignee, and that the plaintiff in error had the right to interpose any defense allowable under the statute. *Jordan v. Investment Corp. of Savannah*, 39 Ga. App. 148, 146 S. E. 498.

A defendant may plead set-off in a trover action brought under this section and the court erred in holding that the answer as amended did not set out any defense to the suit. *Jordan v. Investment Corp. of Savannah*, 39 Ga. App. 144, 146 S. E. 498.

§ 4485. (§ 3888.) Trespass.

Trespass by Domestic Animals. — If domestic animals, such as oxen and horses, injure any one in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before. *Wright v. Turner*, 35 Ga. App. 241, 132 S. E. 650, citing *Clark v. State*, 35 Ga. App. 241, 132 S. E. 650; *Cooley on Torts*, 341, 342 (2d ed. 402); *Reed v. Southern Exp. Co.*, 95 Ga. 108, 22 S. E. 133.

CHAPTER 4

Of Defenses

ARTICLE 1

Of Justification

§ 4489. (§ 3892.) Extenuation.

Jury to Consider Testimony.—When the defendant has introduced testimony tending to sustain a plea of justification, though it fails to make it out, the jury may take such testimony into consideration in mitigation of damages. *Hutcheson v. Browning*, 34 Ga. App. 276, 129 S. E. 125, citing *Henderson v. Fox*, 80 Ga. 479, 6 S. E. 164; *Ransone v. Christian*, 49 Ga. 491; *Ivester v. Coe*, 33 Ga. App. 620, 127 S. E. 790, 792; 5 *Corpus Juris*, 674 (section 112).

ARTICLE 2

Of Satisfaction, and Herein of Tender

§ 4493. (§ 3896.) Tender of damages.

Refers to Plea of Tender.—The right and privilege given to the defendant by the provisions of the section contemplates and has reference to a plea of tender filed in response to the plaintiff's suit, and not to a mere oral offer or proposal to settle the suit by a future delivery of the property involved. *Downs Motor Co. v. Colbert*, 34 Ga. App. 542, 130 S. E. 592.

§ 4494. (§ 3897.) Tender in trover.

Incomplete Tender.—The requirements of this section can not be taken as having been met when the alleged tender of the automobile consisted of an offer to return it stripped of various parts of the machinery with which it was equipped when received by the defendant, and likewise stripped of the various portions of the equipment which had been substituted for the original equipment by the defendant mechanic. *Chalker & Russell v. Savannah Motor Co.*, 37 Ga. App. 532, 140 S. E. 916.

Applied in *Downs Motor Co. v. Colbert*, 34 Ga. App. 542, 130 S. E. 592.

ARTICLE 3

Limitation of Actions

§ 4495. (§ 3898.) For damages to realty.

Quoted in *King v. Miller*, 35 Ga. App. 427, 133 S. E. 302.

§ 4496. (§ 3899.) To personalty.

Damage sustained by a father for the loss of the services of his minor child is damage to a property right, and a suit for damages thus arising may be brought within four years. *Bainbridge Power Co. v. Ivey*, 38 Ga. App. 586, 144 S. E. 825.

Cited in *Endsley v. Ga. Ry. & Power Co.*, 37 Ga. App. 439, 140 S. E. 386.

§ 4497. (§ 3900.) To the person.

Applied in *Mansor v. Wilcox*, 35 Ga. App. 213, 132 S. E. 251.

Applied to bar a suit for injury to reputation in *Bagwell v. Rice, etc., Co.*, 38 Ga. App. 87, 143 S. E. 125.

CHAPTER 5

Of Damages

§ 4502. (§ 3905). General rule.

Cited in Endsley v. Ga. Ry. & Power Co., 37 Ga. App. 439, 442, 140 S. E. 386; Clay v. Brown, 38 Ga. App. 157, 142 S. E. 911; Atlanta, etc., R. Co. v. Smith, 38 Ga. App. 20, 24, 142 S. E. 308.

§ 4503. (§ 3906.) Aggravation.

Charge of Section in Slander Case.—In a case of slander where the words were spoken merely in jest, and only for the purpose of “teasing” the person to whom they were addressed,—where the evidence showed that the utterance was made and published as alleged, a charge to the jury in the language of this section was not error on the ground that there was no evidence of “aggravating circumstances.” Barker v. Green, 34 Ga. App. 574, 130 S. E. 599.

Whether this section cannot be applicable at all in a slander case is not presented in and is not passed on by Barker v. Green, 34 Ga. App. 574, 130 N. C. 599.

No Punitive Damages in Action for Homicide of Husband.—A wife, when suing for the homicide of her husband, under section 4425, can not recover, in addition to a sum representing the full value of the husband's life, a sum for punitive and exemplary damages, as provided in this section. Engle v. Finch, 165 Ga. 131, 139 S. E. 868.

§ 4504. (§ 3907.) Vindictive damages.

See annotations to the preceding section.

Instruction as to Present Worth of Pain.—A jury in a personal injury suit, where damages for future pain and suffering are sued for, should not be instructed that the amount representing the monetary compensation for future pain and suffering should be reduced to its present worth. Louisville, etc., R. Co. v. Maffett, 36 Ga. App. 513, 137 S. E. 404.

It would be proper, however, in such a case to instruct the jury that in awarding damages for future pain and suffering they should give consideration to the fact that the plaintiff is receiving a present cash consideration for damage not yet sustained. Southern R. Co. v. Bottoms, 35 Ga. App. 804, 134 S. E. 824.

§ 4505. (§ 3908.) Necessary expenses.

Instruction as to Reasonable Expenses for Medical Attention.—An instruction to the jury that the plaintiff would be entitled to recover the reasonable expenses that were incurred for medical attention “on account of injuries” was equivalent to an instruction that the plaintiff could recover the “necessary expenses consequent upon the injury,” as provided in this section. Orange Crush Bottling Co. v. Smith, 35 Ga. App. 92, 132 S. E. 259.

§ 4507. (§ 3910). General damages, special damages.

Cited in Endsley v. Ga. Ry. & Power Co., 37 Ga. App. 439, 442, 140 S. E. 386.

§ 4508. (§ 3911). Direct and consequential damages.

Recovery Limited to Direct Damages.—Where any recovery authorized is limited to direct damages, that is, damages such as “follow immediately upon the act done” a recovery can not be had under a petition which makes no claim for damages of such character, but limits the nature and basis of the recovery sought to subsequently accruing consequential damages. City Council of Aigista v. Lamar, 37 Ga. App. 413, 419, 140 S. E. 763.

Cited in dissenting opinion in Letton v. Kitchen, 165 Ga. 121, 130, 142 S. E. 658.

§ 4509. (§ 3912.) Damages too remote, when.

Presence of Other Hypotheses as to Cause of Injury.—Where there were several reasonable hypotheses as to the cause of the injury with which the evidence was not less consistent than with the conclusion sought to be established, the evidence was insufficient to authorize a finding that the injury was the proximate result of the defendant's negligence. Pullman Co. v. Strang, 35 Ga. App. 59, 80, 132 S. E. 399.

§ 4510. (§ 3913.) Rule to ascertain.

A result intended by a wrongdoer cannot, under this and the following section, be too remote for recovery of damages. Richards v. International Agricultural Corp., 10 Fed. (2d), 218.

§ 4514. (§ 3917). Highest amount proved.

Cited in Hoffman v. Lynch (Ga.), 23 Fed. (2d) 518.

TENTH TITLE

Of Equity

CHAPTER 1

General Principles

§ 4518. (§ 3921.) Equity jurisdiction.

The Municipal Court of the City of Atlanta Has No Equity Jurisdiction.—See Ahlgren v. Walton, 34 Ga. App. 42, 128 S. E. 585.

Applied in Watters v. Southern Brighton Mills, 163 Ga. 15, 30, 147 S. E. 87.

§ 4519. (§ 3922). Grounds of relief.

Applied in Edwards Manufacturing Co. v. Hood, 167 Ga. 144, 145 S. E. 87.

§ 4520. (§ 3923). Equity follows the law.

Garnishment.—Equitable petition did not lie to garnish wages of warden of county chain-gang. McConnell v. Floyd County, 164 Ga. 178, 137 S. E. 919.

Applied in determining which of several parcels held by taxpayer under bonds for title was liable for taxes. Planters Warehouse Co. v. Simpson, 164 Ga. 190, 138 S. E. 55.

Applied on issue between county and holder of security deed as to tax payments for specified years. Phoenix Ins. Co. v. Appling County, 164 Ga. 861, 139 S. E. 674.

§ 4521. (§ 3924.) Complaint must do equity.

Applicable Where Both Legal and Equitable Relief Sought.—The principle established by this section is as well applicable where one in an equity suit seeks both legal and equitable relief, as where he seeks a purely equitable right. Montgomery v. Atlanta, 162 Ga. 534, 550, 134 S. E. 152.

Favorite Maxim.—The equitable maxim which is embodied in this section is a favorite maxim in equity. Duke v. Ayers, 163 Ga. 444, 454, 136 S. E. 410; Autry v. Southern Ry. Co., 167 Ga. 136, 142, 144 S. E. 741.

Applications.—In Magid v. Byrd, 164 Ga. 609, 139 S. E. 61, it is said: “Even should Magid be treated as substituted trustee for these bondholders, who had used his own funds in buying this property for their account, these bondholders can not recover the property from him without having first refunded or offered to refund to him the funds so used by him for their benefit, the maxim of this section applies.”

Petitioner should not be allowed to enjoin the plaintiff from enforcing her judgment against it and the surety upon its supersedeas bond, where it does not pay or offer to pay her the amount which it admits it owes her on the joint judgment. Autry v. Southern Ry. Co., 167 Ga. 136, 144 S. E. 741.

Cited in Mayor v. Brown, 168 Ga. 1, 12.

§ 4522. (§ 3925.) Complete justice.

Effect of Dismissal of Petition upon Cross Bill.—The dismissal of the plaintiff's petition will not have the effect of dismissing a cross-bill of the defendant, although the relief prayed is not equitable in character and is cognizable in a

court of law, in view of the uniform procedure act. *Jackson v. Mathis*, 35 Ga. App. 178, 132 S. E. 410.

Favorite Maxim.—The maxim embodied in this section is a favorite maxim of equity. *Henderson v. Lott*, 163 Ga. 326, 331, 136 S. E. 403.

Application.—Equity seeks always to do complete justice; and having the parties before it rightfully for the purpose of cancelling said deeds from the husband to the wife, it could proceed to give full relief to the plaintiffs in reference to the subject-matter of the suit, the court having jurisdiction for that purpose, by ordering the property sold subject to the security deed, or by making the holder of the security deed a party to the case, and ordering the sale of the property embraced in the security deed, applying the proceeds of the sale first to the payment of such secured debt, and the balance to the judgments of the plaintiffs. *Roach v. Terry*, 164 Ga. 421, 138 S. E. 902.

§ 4528. (§ 3931.) Possession notice of title.

Reference for Review of Cases.—For an exhaustive review of cases decided upon the principle inculcated by this section, see *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Notice of Whose Rights.—Possession is not only notice of the rights of the possessor, but of those under whom he claims. *Walker v. Neil*, 117 Ga. 733, 745, 45 S. E. 387; *Austin v. Southern Home Bldg., etc., Assn.*, 122 Ga. 439, 50 S. E. 382; *McDonald v. Dabney*, 161 Ga. 711, 724, 132 S. E. 547.

Exclusiveness of Occupancy.—The possession of land which will be notice of the occupant's title must have some element in it indicative that the occupancy is exclusive in its nature. *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Possession Open, Visible, etc.—In order for the possession to have the effect of notice it must be actual, open, visible, exclusive and unambiguous. *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Possession of land by tenants of wife gave notice to purchaser under execution sale against husband. *Sikes v. Seckinger*, 164 Ga. 96, 137 S. E. 833.

§ 4529. (§ 3832.) Notice.

Applied in *Waynesboro Planing Mill v. Augusta Veneer Co.*, 35 Ga. App. 686, 134 S. E. 790.

Notice Received in Representative Capacity.—Notice received in representative capacity affects act transacted in personal capacity. *Puckett v. Jones*, 36 Ga. App. 253, 136 S. E. 462.

§ 4530. (§ 3933.) Notice extends to facts discovered.

Section Not Superseded.—This principle is not superseded by section 4294(56) of our negotiable instruments law, as to instruments not embraced therein. *National Bank v. Maryland Casualty Co.*, 167 Ga. 737, 146 S. E. 739.

The record of a conditional sale is notice to the world that the owner of the property has parted with his absolute dominion over it, but retains the title as security for his debt, and of every fact which might be ascertained from an inquiry which the record properly suggests. *Chattanooga Finance Corp. v. Bitting*, 38 Ga. App. 490, 144 S. E. 331.

Where, however, all that the record discloses is that the vendee of the property owes a stated portion of the purchase price, and that the title to the property is reserved in the vendor until the purchase price is fully paid, and there is nothing to indicate or suggest that the vendee has executed a negotiable note for the unpaid purchase price, there is nothing to put on inquiry a purchaser from the vendor in possession of the property as to the rights of any one who might claim as the transferee of an undisclosed negotiable instrument. In such a case an innocent purchaser from the vendor in possession is only bound to inquire into the respective claims of the vendor and the vendee under the recorded instrument. *Chattanooga Finance Corp. v. Bitting*, 38 Ga. App. 490, 144 S. E. 331.

Changing Section.—In *Benton v. Benton*, 164 Ga. 541, 550, 139 S. E. 68, it is said: "Besides, after giving the instruction complained of, the court read to the jury section 4530 of the Code of 1910, which declares that 'Notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, is equivalent to knowledge, in fixing

the rights of parties." The court then read to the jury section 4626 of the Code of 1910, which declares that "Fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence." So we are of the opinion that the court fully and fairly presented to the jury the principles of law applicable to the issues raised in this case, and that a new trial should not be granted because of the instruction with which we have been dealing."

Waiver in Insurance.—The unauthorized act of an agent, done in the principal's behalf, can not be ratified by the principal without actual knowledge of the act. The provisions of this section have no application to the subject of waiver as related to conditions imposing forfeitures in contracts of insurance. *Penn Mutual Life Ins. Co. v. Blount*, 165 Ga. 193, 140 S. E. 496; *Penn Mutual Life Ins. Co. v. Blount*, 39 Ga. App. 429, 437, 147 S. E. 768.

Description of Stock of Goods.—Under this section description of property in a chattel mortgage as "our stock of merchandise consisting of dry goods, shoes, clothing, groceries, and hardware," is sufficient where it is shown that the mortgagor was a well-known firm and had only one stock of goods, which was located in the town where the mortgage was executed. In *re Coleman*, 2 Fed. (2d), 254.

Applied in *Waynesboro Planing Mill v. Augusta Veneer Co.*, 35 Ga. App. 686, 134 S. E. 790.

Charge of Section Upheld.—The charge of the court in substance as this section was upheld under the evidence and circumstances of the case. *Darden v. Washington*, 35 Ga. App. 777, 134 S. E. 813.

Cited in *North Georgia Trust, etc., Co. v. Hulme*, 35 Ga. App. 627, 134 S. E. 200; *Fender v. Hodges*, 38 Ga. App. 78, 82, 142 S. E. 753.

§ 4531. (§ 3934.) Bona fide purchaser.

See annotations to § 3762.

Evidence as to Bona Fides Conflicting—Injunction Denied.—Injunction against exercising power of sale will be denied where there is conflict of evidence that the creditor had knowledge that the land was paid for by the debtor with trust fund. *Johnson v. Southern States Phosphate, etc., Co.*, 163 Ga. 98, 135 S. E. 435.

Right of Bona Fide Purchaser Unqualified.—The purchaser is entitled to his bargain, if made in good faith, and can not be disturbed in his possession, no matter what equitable arrangement the holder of the secret equity proposes as affording protection to all the parties concerned, and a court of equity has no jurisdiction to interfere with such vested legal right and title. *Johnson v. Southern States Phosphate, etc., Co.*, 163 Ga. 98, 105, 135 S. E. 435.

A bona fide mortgagee stands precisely in the attitude of a bona fide purchaser, and is entitled to the same protection. *Johnson v. Southern States Phosphate, etc., Co.*, 163 Ga. 98, 105, 135 S. E. 435.

Illustration.—Pursuant to this section and section 4535 it is held that where the husband has the paper title to land in his own name, and, being in possession, conveys the same by deed to his second wife, his deed to her being based in part upon a valuable consideration and in part upon a good consideration, and being taken without notice of the claim of his children by a former marriage to the land, based upon an implied trust growing out of the fact that the land was bought with money of their mother and title taken in the name of the husband when it should have been taken in the name of the former wife, the title of the second wife is superior to the secret equity of the children by the former marriage. *DeLoach v. Purcell*, 166 Ga. 362, 143 S. E. 424.

Cited in *Long v. Atlanta Trust Co.*, 164 Ga. 21, 137 S. E. 394.

§ 4532. (§ 3935.) May do what court would compel.

Specific Performance.—Parties can voluntarily do what equity will compel them to do; and equity will not entertain a bill for specific performance when the parties have already performed what they ought to have done. *Sikes v. Seckinger*, 164 Ga. 96, 137 S. E. 833.

§ 4533. (§ 3936.) Lis pendens, notice by.

Bankruptcy against H., Notice to W's Mortgagee.—The pendency of bankruptcy proceedings against the husband is general notice to the mortgagee of the wife who claims title under the husband. *Chatham Chemical Co. v. Vidalia Chemical Co.*, 163 Ga. 276, 278, 136 S. E. 62.

Illustration.—The plaintiff in the instant case bought the property in controversy pending litigation between the defendant and the person from whom the plaintiff bought it, in which litigation the deed of plaintiff's vendor was canceled. The land in controversy was subsequently levied upon by the sheriff under a fi. fa. obtained in favor of the defendant in error against the husband of the plaintiff's vendor. Applying the principles of this section the court did not err in sustaining the demurrer and in dismissing the petition. *Bennett v. Stokey*, 164 Ga. 694, 139 S. E. 346.

Cited in *Bennett v. Stokey*, 164 Ga. 694, 139 S. E. 346.

§ 4534. (§ 3937). Both parties.

Applied in *Felder v. Paulk*, 165 Ga. 135, 139 S. E. 873.

§ 4335. (§ 3938.) Purchaser without notice from one with notice, and vice versa.

See notes to § 4531.

Principle Applied.—See *Bank v. Wheeler*, 162 Ga. 635, 134 S. E. 753.

Applied to bona fide holder of note from a mala-fide grantee in a security deed. *First Nat. Bank v. Pounds*, 163 Ga. 551, 136 S. E. 528.

The reason is that otherwise a bona fide purchaser might be deprived of selling his property for full value. *North Georgia Trust, etc., Co. v. Hulme*, 35 Ga. App. 627, 134 S. E. 200.

Cited in *Long v. Atlanta Trust Co.*, 164 Ga. 21, 137 S. E. 394.

§ 4536. (§ 3939). Laches.

Under the facts in this case it cannot be held as a matter of law that the plaintiff is precluded, by her delay and laches in discovering the fraud, from prosecuting her suit for rescission. *Cohron v. Woodland Hills Co.*, 164 Ga. 581, 590, 139 S. E. 56.

§ 4537. (§ 3940.) Which of two innocent persons to bear loss.

Must Be Equally Innocent.—The principle announced in this section, is not applicable in this case, for the reason that the principals are not innocent parties, but are each chargeable with the fraud perpetrated by the common agent. *Napier v. Adams*, 166 Ga. 403, 412, 143 S. E. 566.

Instances of Application.—Undisclosed principal subject to same defenses as are available against the agent. *Truluck v. Carolina Portland Cement Co.*, 34 Ga. App. 501, 130 S. E. 356.

When an alleged principal, by acts or conduct, has knowingly caused or permitted another to appear as his agent, he will be estopped to deny the agency, to the injury of third persons who have in good faith and in reasonable prudence dealt with the apparent agent on the faith of the relation. *Davis v. Citizens'—Floyd Bank & Trust Co.*, 37 Ga. App. 275, 139 S. E. 826.

The failure of H to record a bond and transfer placed it in the power of R to deceive and defraud some other person by misrepresenting the facts, and that is what occurred; consequently this section applies. *Fender v. Hodges*, 166 Ga. 727, 734, 144 S. E. 278.

Applied as between holders of security deeds, later recorded first, without notice of earlier. *Mortgage Guar. Co. v. Atlanta Commercial Bank*, 166 Ga. 412, 416, 143 S. E. 562.

This section applies against the maker of a check to a thief for stolen property, and in favor of an indorsee who cashed it. *Milner v. First Nat. Bank*, 38 Ga. App. 668, 670, 145 S. E. 101.

Cited in *Moseley v. Phoenix Mutual Life Ins. Co.*, 167 Ga. 491, 145 S. E. 877.

§ 4538. (§ 3941.) Common-law remedy.

Prayer for Discovery, etc., Immaterial—When.—Notwithstanding the prayer for "discovery," "accounting," and relief in equity, where the petition alleges no cause showing inadequacy at law, equity has no jurisdiction. *Decatur County v. Praytor, etc., Co.*, 36 Ga. App. 611, 137 S. E. 918.

Partition Proceedings.—In proceedings for partition where no peculiar circumstances are shown for equitable jurisdiction, equity will not interfere; the remedy prescribed at law

in § 5355 being sufficient for partition purposes. *Saffold v. Anderson*, 162 Ga. 408, 410, 134 S. E. 81.

Cancelling Policy after Loss on Ground of Fraud.—The question whether equity will cancel a policy and enjoin proceedings at law thereon, on the ground of fraud, that defense being available at law, was raised but not decided in *Davis v. Metropolitan Life Ins. Co.*, 161 Ga. 568, 573, 131 S. E. 490.

Award of industrial commission, not reformed, where plaintiff had remedy under workmen's compensation act. *Bishop v. Bussey*, 164 Ga. 642, 139 S. E. 212.

Application.—In *Bishop v. Bussey*, 164 Ga. 642, 646, 139 S. E. 212, it is said: "This judgment of the superior court can not be held or treated as void, but must either stand, or be reformed so as to speak the truth; that is, that the alleged corporation under which Bishop did business was in fact F. A. Bishop, and only a court of equity could set aside or reform the judgment of the superior court under the facts, and give complete relief, as was done in this case. See Civil Code (1910), § 4538; *Michie's Georgia Code* (1926), § 4538, and cit.; *Ga. Peruvian Ochre Co. v. Cherokee Ochre Co.*, 152 Ga. 150, 154, 108 S. E. 609."

Applied in *Continental Trust Co. v. Sabine Basket Co.*, 165 Ga. 591, 594, 141 S. E. 664.

§ 4540. (§ 3943). Concurrent jurisdiction.

Stated in *Davis v. Culpepper*, 167 Ga. 637, 146 S. E. 319.

Cited in dissenting opinion in *Letton v. Kitchen*, 166 Ga. 121, 130, 142 S. E. 658.

CHAPTER 3

Of Perpetuation of Testimony

ARTICLE 2

Method of Perpetuating Testimony

§ 4560. (§ 3963.) Application and order.

Effect of Failure to Bring Suit against All Parties Named.—Where an application is made naming several parties as possible defendants, it is not necessary that a suit be instituted against all persons named in order to use the testimony against one of them. *Hardeman v. Ellis*, 162 Ga. 664, 135 S. E. 195.

CHAPTER 4

Of Accident and Mistake

§ 4567. (§ 3970.) Error in form.

Relief Notwithstanding Set off at Law.—The equitable relief prescribed by this section will be given notwithstanding the existence of a defense by way of set off in favor of the defendant which he might be availed of at law. *Gibson v. Alford*, 161 Ga. 672, 682, 132 S. E. 442.

Mistake on One Side, Fraud on the Other.—In addition to reforming a contract when, from mutual mistake or mistake common to both parties, an instrument does not express the true agreement of the parties, a court of equity will also reform an instrument where there is ignorance or mistake on one side, and fraud or inequitable conduct on the other. *Gibson v. Alford*, 161 Ga. 672, 682, 132 S. E. 442.

Correcting Misdescription to Conform to Agreement.—Where it is made to appear that an agreement was made with reference to a certain designated piece of land, reformation of the contract made to evidence the agreement will be decreed if the misdescription in the contract or deed includes more land than ought to be included, or contains less than the parties agreed upon. *Gibson v. Alford*, 161 Ga. 672, 682, 132 S. E. 442.

Applied in *Wachovia Bank & Trust Co. v. Jones*, 166 Ga. 747, 144 S. E. 256; *Blaylock v. Hackel*, 164 Ga. 257, 138

S. E. 333; Whittle v. Nottingham, 164 Ga. 155, 159, 138 S. E. 62.

§ 4568. (§ 3971.) Rule of construction as to conditions.

Cited in Grantham v. Royal Ins. Co., 34 Ga. App. 415, 130 S. E. 589.

§ 4571. (§ 3974.) Relief in equity for negligence of complainant, when.

Error in disallowing interventions of non-resident creditors, after time limit in order for filing claims in receivership against bankrupt. Columbus Iron Works v. Sibley, 164 Ga. 121, 122, 137 S. E. 757.

Applied in Martin v. Turner, 166 Ga. 293, 295, 143 S. E. 239.

§ 4576. (§ 3979.) Mistake of law by parties.

Applied in State Highway Dept. v. Fidelity, etc., Co., 168 Ga. 288, 290, 147 S. E. 522.

§ 4578. (§ 3981.) Reforming a contract, etc.

If mistake is relied on, it must be distinctly charged and stated with precision, the particular mistake being shown and how it occurred. In other words, the pleader should state why the terms of the actual contract happened to be left out, or how terms not agreed on came to be inserted. R. C. L. 361. Frank v. Nathan, 159 Ga. 202, 208, 125 S. E. 66; Martin v. Turner, 166 Ga. 293, 295, 143 S. E. 239.

Applied in Wachovia Bank & Trust Co. v. Jones, 166 Ga. 747, 748, 144 S. E. 256.

§ 4580. (§ 3983.) Mistake of fact.

See notes to § 4567.

Laches Repelled by Other Circumstances.—While the suit was brought many years after the making of the deed, the original purchaser, and the other two parties plaintiff had been in continual possession of the land, and the plaintiffs were not aware of the mistake in the deed until a short time before the suit was brought. This fact, and where there had been no assertion of a claim adverse to the rights of the plaintiffs, as set up in the petition, and no fact or circumstance to put plaintiffs on notice of such claim, and the further fact that no rights of third parties had intervened, warrants the finding that the plaintiffs were not barred by laches. Sweetman v. Dailey, 162 Ga. 295, 133 S. E. 257.

§ 4581. (§ 3984.) Negligence and concealment.

No inability to read and no other sufficient reason is alleged as an excuse for ignorance of the facts, and for failure within reasonable time to apply for equitable relief. Paris v. Treadaway, 166 Ga. 138, 140, 142 S. E. 693.

If a purchaser has equal opportunities with his vendor for discovering the identity of the land sold, he is bound to avail himself of those opportunities. If he fails to do so and on account of his own gross negligence he is injured, relief will not be granted to him on the ground of mutual mistake as to the identity of the property. However, if the sale was induced by a false representation of the sale agent of the seller as to the identity of the property known by the agent to be false, the purchaser would not be required to show diligence in investigating the truth of the representations, in order to be entitled to a rescission on the ground of fraud. Hamlin v. Johns, 166 Ga. 880, 881, 144 S. E. 659.

§ 4584. (§ 3987.) Equity may set aside judgments.

Applied in Bryant v. Bush, 165 Ga. 252, 140 S. E. 366; Fain v. Fain, 166 Ga. 504, 143 S. E. 586.

§ 4585. (§ 3988.) Setting aside judgments for good defense.

Applied in Bryant v. Bush, 165 Ga. 252, 140 S. E. 366.

CHAPTER 5

Of Account and Set-Off

§ 4586. (§ 3989.) Account.

Accounting between Parties.—A court of equity has jurisdiction in all cases of an accounting and settlement between partners. Smith v. Hancock, 163 Ga. 222, 229, 136 S. E. 52.

§ 4587. (§ 3990.) Mingling of goods.

Applied against a sheriff as to fund procured from execution sale. Finance Co. v. Lowry, 36 Ga. App. 337, 136 S. E. 475.

Applied in Johnson v. King Lumber Co., 39 Ga. App. 280, 147 S. E. 142.

§ 4588. (§ 3991.) Contribution.

Nothing Paid.—It does not lie in the mouth of petitioner to claim contribution when it has paid nothing upon the alleged joint obligation. Autry v. Southern Ry. Co., 167 Ga. 136, 142, 144 S. E. 741.

§ 4591. (§ 3994.) Party must surcharge and falsify.

Applied in Walker v. Industrial Stores Co., 37 Ga. App. 448, 140 S. E. 519.

§ 4593. (§ 3996.) Equitable set-off.

Set-Off Not Allowed.—To an action ex contractu damages sounding in tort can not be pleaded in defense, where neither the insolvency nor non-residence of the plaintiff is set up. Berry v. Brunson, 166 Ga. 523, 530, 143 S. E. 761.

Set-Off Permitted.—Where there is an individual claim of the estate against C, who is both executor and legatee under the will of testator, and who as legatee is entitled to a balance on a legacy under the will, his individual debt to the estate can, both under the bankrupt law and equitable principles, be set off against his legacy. Bellah v. Cleghorn, 165 Ga. 494, 497, 141 S. E. 311.

Accommodation maker of note to corporation could set-off liability of its organizers before capital subscribed. Crandall v. Shepard, 166 Ga. 396, 402, 143 S. E. 587.

CHAPTER 6

Of Administration of Assets

§ 4596. (§ 3999.) Interfering with administration.

Applied in Bryant v. Bush, 165 Ga. 252, 140 S. E. 366.

Cited in Nash v. Cowart, 162 Ga. 236, 133 S. E. 263.

§ 4597. (§ 4000.) Petitions for direction.

See notes to § 5419.

Only Representative Can Ask Relief.—Under this section only the representative of the estate may ask for the direction of a court. Palmer v. Neely, 162 Ga. 767, 135 S. E. 90.

Cash Surrender Value of Policy.—The cash surrender and cash loan value of a policy of life insurance accruing at the end of a specified tontine period is not subject to garnishment by creditors of the insured; nor will such value be made available to the judgment creditor of the insured by a court of equity in proceedings instituted for the purpose of obtaining equitable relief analogous to a process of garnishment at law. Farmers, etc., Bank v. National Life Ins. Co., 161 Ga. 793, 131 S. E. 902.

Cited in Cooper v. Reeves, 161 Ga. 232, 131 S. E. 63.

§ 4600. (§ 4003.) Creditor's petitions.

See notes to § 4571.

CHAPTER 8

Of Election

§ 4609. (§ 4012.) Election.

Cited in *Hardeman v. Ellis*, 162 Ga. 664, 135 S. E. 195, which case was distinguished from *Lamar v. McLaren*, 107 Ga. 591, 34 S. E. 116, decided under this section.

§ 4610. (§ 4013.) By a legatee.

Cited in *Robinson v. Ramsey*, 161 Ga. 1, 10, 129 S. E. 837.

CHAPTER 9

Of Execution of Powers

§ 4620. (§ 4023.) Power of sale in deeds of trust, etc.

Sale of Part of Land Not Authorized.—The holder of a security deed, which conveys a single tract of land, can not under a power of sale contained in said deed which authorizes such holder to sell the same upon default of the grantor in paying the debt secured thereby, sell a part of said tract, but must sell the whole. *Doyle v. Moultrie Bkg. Co.*, 163 Ga. 140, 142, 135 S. E. 501.

Where the title to land is conveyed to secure a debt, and the instrument is not merely a mortgage, a power of sale on failure to make payment is a power coupled with an interest, and is not revoked by the death of the debtor. *Lewis v. King*, 165 Ga. 705, 141 S. E. 909.

CHAPTER 10

Of Fraud

§ 4621. (§ 4024.) Jurisdiction over fraud.

In General.—This section was codified from *Trippe v. Ward*, 2 Ga. 304, in which the principle is stated thus: "In cases of fraud (with the exception of fraud in obtaining a will) courts of equity and courts of law have concurrent jurisdiction, and the court which first acquires jurisdiction is entitled to return it." *DeLaperriere v. Williams*, 167 Ga. 648, 652, 146 S. E. 482.

§ 4622. (§ 4025.) Actual and constructive fraud.

In *Lathrop v. Miller*, 164 Ga. 167, 138 S. E. 50, it was held: "Neither of the foregoing allegations is sufficient to sustain a cause of action based upon fraud. It was held in the case of *Anderson v. Goodwin*, 125 Ga. 669, 54 S. E. 682: 'Mere allegations of fraud are insufficient. "It is well settled that a general allegation of fraud in a bill amounts to nothing—it is necessary that the complainant show, by specifications, wherein the fraud consists." And see, to the same effect, *Carter v. Anderson*, 4 Ga. 519; *Miller v. Butler*, 121 Ga. 761, 49 S. E. 754; *Mobley v. Belcher*, 144 Ga. 444, 87 S. E. 470."

A married woman who marries another man, knowing that her husband is still living, and when the marriage has not been dissolved by divorce, perpetrates a fraud upon the man whom she so marries and who is ignorant of her existing marriage, without disclosing to him her existing marriage. *Collins v. Collins*, 165 Ga. 198, 140 S. E. 501.

Applied in *Bryant v. Bush*, 165 Ga. 252, 140 S. E. 366; *King Hardware Co. v. Ennis*, 39 Ga. App. 362, 147 S. E. 119.

§ 4623. (§ 4026.) Misrepresentation.

See notes to § 4712.

Applied in *Penn Mutual Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 511, 144 S. E. 400; *Nix v. Citizens Bank*, 35 Ga. App. 546, 130 S. E. 597.

Cited in dissenting opinion in *Hamlin v. Johns*, 166 Ga. 880, 882, 144 S. E. 659.

§ 4626. (§ 4029.) Slight evidence sometimes sufficient.

Family Transactions.—This rule is particularly true in family transactions. *Stephens v. Stephens*, 168 Ga. 530, 645, 148 S. E. 522.

An instruction in the language of this section, was not error for failure to charge in immediate connection "that slight circumstances also may be sufficient to rebut the existence of fraud." *Strickland v. Jackson Banking Co.*, 166 Ga. 713, 144 S. E. 262.

But there being no allegation or evidence of any confidential relation between any of the plaintiffs and any of the defendants, or that the relief sought was because of a breach of duty arising from such relation, an instruction in the language of this section was harmfully erroneous. *Strickland v. Jackson Banking Co.*, 166 Ga. 713, 144 S. E. 262.

Cited in *Slade v. Raines*, 165 Ga. 8, 139 S. E. 805; *Traders' Securities Co. v. Canton Drug Co.*, 38 Ga. App. 165, 170, 143 S. E. 452; *Eberhardt v. Bennett*, 163 Ga. 796, 803, 137 S. E. 64.

§ 4628. (§ 4031.) Confidential relations preventing acquisition of adverse rights.

Applied as between principal and agent in *Napier v. Adams*, 166 Ga. 403, 406, 143 S. E. 566.

§ 4629. (§ 4032.) Fraud annuls deeds, judgments, etc.

See notes to § 4712.

Cited in dissenting opinion in *Feingold v. McDonald Mortgage & Realty Co.*, 166 Ga. 838, 846, 145 S. E. 90.

CHAPTER 11

Of Specific Performance

§ 4633. (§ 4036.) Specific performance, when decreed.

Includes Parol Contracts.—This section includes parol as well as written contracts. *Valdosta Machinery Co. v. Finley*, 164 Ga. 706, 709, 139 S. E. 337.

Parol evidence was admissible in support of the very definite description of the purchased premises as embodied in the petition, and the description was such that parol evidence was admissible for the purpose of identification of the subject-matter of the contract. The ruling upon the special demurrers is controlled by the principles announced in the second division of the opinion. *Valdosta Machinery Co. v. Finley*, 164 Ga. 706, 139 S. E. 337.

Applied in *Watters v. Southern Brighton Mills*, 168 Ga. 15, 30, 147 S. E. 87.

Cited in dissenting opinion in *Hamlin v. Johns*, 166 Ga. 880, 882, 144 S. E. 659.

§ 4634. (§ 4037.) Parol contract for land.

Parol Evidence Is Admissible.—In an action for specific performance of a contract, not in writing, for the exchange of lands, parol evidence is necessarily admissible for the purpose of proving such contract. *Hattaway v. Dickens*, 163 Ga. 755, 137 S. E. 57.

Payment of Full Purchase Price—Erroneous Instruction.—In a dispute between two claimants as to the ownership of land, where it appeared that one of them bought the land under a parol contract and paid the full purchase price without receiving a deed, an instruction to the jury that "the only question to be considered by them is who has the superior title, the legal written title, to the land in question," is erroneous as excluding from the jury the right of the claimant under this section. *Franklin v. Womack*, 162 Ga. 715, 134 S. E. 758.

§ 4636. (§ 4039.) Voluntary promises.

Cited in *Burt v. Gooch*, 37 Ga. App. 301, 306, 139 S. E. 912.

§ 4637. (§ 4040.) Inadequacy of price.

In *Hankinson v. Hankinson*, 168 Ga. 156, 163, 147 S. E. 106, after quoting this section it is said: "But we do not think that this principle is applicable to its full extent where an oral contract to make a will, under the circumstances and for the consideration set forth in the petition in this case, is shown. *Flemister v. Central Georgia Power Co.*, 140 Ga. 511 (8), 517, 79 S. E. 148; *McGee v. Young*, 132 Ga. 606, 64 S. E. 689."

Applied in *Chan v. Judge*, 36 Ga. App. 13, 134 S. E. 925.

§ 4638. (§ 4041.) Ability of complainant to comply.

Applied in *Smith v. David*, 168 Ga. 511, 524, 148 S. E. 265.

THE CODE OF PRACTICE

FIRST TITLE

Courts of Original Jurisdiction, Their Officers, Organizations, and Practice

CHAPTER 1

General Provisions

§ 4642. (§ 4045.) When judicial officer is disqualified.

Grounds Enumerated Exhaustive. — The statutory grounds of the disqualification of a judge are set forth in this section, and are exhaustive of the subject. It follows that basis or prejudice on the part of a judge is no ground for his disqualification. *Hendricks v. State*, 34 Ga. App. 508, 130 S. E. 539.

The above statutory grounds of disqualification of an ordinary are exhaustive, and the fact that the ordinary is a partisan of the contestant does not disqualify such officer from presiding in the contest of the mayor's election. *Moore v. Dugas*, 166 Ga. 493, 143 S. E. 591.

Prejudice or bias, not based on interest, will not disqualify the ordinary from presiding in such a contest. *Moore v. Dugas*, 166 Ga. 493, 143 S. E. 591.

Former Counsel.—The rule as to disqualification when the judge has served as counsel in the case, applied in *Faulkner v. Walker*, 36 Ga. App. 636, 137 S. E. 909.

Disqualification to Forfeit Bond.—A presiding judge who is disqualified to try a criminal case is also disqualified to forfeit a bond in such case, or to grant a rule nisi on the forfeiture. *Faulkner v. Walker*, 36 Ga. App. 636, 137 S. E. 909.

Illustration.—In *Edwards v. Gabrels*, 168 Ga. 738, 741, 148 S. E. 913, it appeared that the judge would have a pecuniary interest in the question as to whether or not administrators, who are alleged to be mismanaging the estate and wasting it, should be removed and a receiver be appointed who would conserve the estate. Hence this section applied.

Even if upon objections made at the proper time the judge should have held himself disqualified in the present case, the defendant could not, after having gone through a large part of the trial, object to the judge on the ground of his disqualification, without showing that he did not know of this disqualification until after the trial began. He is estopped from doing so. He could not go into the trial, take chances for favorable rulings of the court, and then, when the rulings were adverse to him, raise the question of the disqualification of the court. *Wood v. Cauthen*, 168 Ga. 766, 149 S. E. 138.

§ 4643. (§ 4046.) Powers of courts to punish for contempt.

"The bribing or attempting to bribe the witness who had been subpoenaed to appear against the sons of the respondent was opposing, striving against, or attempting to obstruct the process of the court, and was intended to bring to naught and baffle such processes of the court, and therefore in every respect, falls within the meaning given by the lexicographers to the word 'resist' as contained in § 4643 of the Civil Code of 1910, and should be given the meaning here ascribed to it in view of the context of the statute; though it would not necessarily be applicable to the term 'resist' as used in the Penal Code (1910), § 311, because there the act of resisting contemplated and denounced as criminal is one committed while the officer is in the act of executing or attempting to execute some process of the court." *Herring v. State*, 165 Ga. 254, 256, 140 S. E. 491.

All constitutional courts have the inherent power to define and punish contempts; and this right is not denied or limited by this section. *Jones v. The State*, 39 Ga. App. 1, 147 S. E. 806.

There is no merit in the contention that the court erred

in holding the defendant in contempt of court because it did not appear that the alleged offense was committed in the presence of the court, or so near thereto as to interfere with the administration of law and justice. *Burge v. State*, 38 Ga. App. 690, 691, 145 S. E. 463.

Trial by Jury—Violation of Mandamus.—Every court has power to compel obedience to its judgments, orders, and processes; and in a proceeding for contempt growing out of the alleged violation by the defendant therein of a mandamus absolute, the judge can determine all questions of fact without the intervention of a jury, except in the cases provided for in this section. *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 130 S. E. 580.

Illustration.—It was contempt of court, under the provisions of this section for the accused to make to the father and brother of the witness statements intending that they should be communicated to the witness, where such statements naturally tended to coerce and were expected to coerce the witness. *Herring v. State*, 165 Ga. 254, 140 S. E. 491; *Herring v. State*, 37 Ga. App. 594, 141 S. E. 89; *Echols v. State*, 37 Ga. App. 594, 141 S. E. 89.

Cited in *Smith v. State*, 36 Ga. App. 37, 39, 135 S. E. 102.

§ 4644. (§ 4047.) Powers of courts enumerated.

General Consideration—Interference with Receivers Possession.—One who dispossesses the receiver of property consigned to him by the court dispossesses the court, and of course becomes in contempt of court; and he may be punished for contempt, and the property may be restored. A contempt of court being complete by dispossessing the receiver, the fact that no injunctive order has been passed does not affect the case. *Coker v. Norman*, 162 Ga. 351, 133 S. E. 740.

Paragraph 4—Power to Secure Attendance of Witness.—Where it is necessary in order to secure the attendance of a witness at court to make him testify, the court has ample authority to secure his attendance by requiring him to give bail, or, in default thereof, to go to jail. *Pullen v. Cleckler*, 162 Ga. 111, 114, 132 S. E. 761.

Cited in *Smith v. State*, 36 Ga. App. 37, 39, 135 S. E. 102.

CHAPTER 2

Justices' Courts, Their Officers, and Practice

ARTICLE 1

Justices of the Peace, Notaries Public, and Their Courts

§ 4665. (§ 4068.) Civil jurisdiction.

A justice's court has jurisdiction of a suit upon a note where the principal sum claimed does not exceed \$100, irrespective of any interest that may be due. The principal sum sued for in this case being \$96, the court had jurisdiction even though the amount exceeded \$100 when the accrued interest was added. *Southern Express Co. v. Hilton*, 94 Ga. 450, 20 S. E. 126; *Dumas v. Barnesville Bank*, 38 Ga. App. 293, 143 S. E. 794.

ARTICLE 4

Of Jurisdiction of Justices' Courts

§ 4712. (§ 4113.) If justice of the peace is a party.

Applied in *Cohron v. Woodland Hills Co.*, 164 Ga. 581, 587, 139 S. E. 56.

ARTICLE 5

Commencement of Suits, Service, etc.

§ 4715. (§ 4116.) Suits, how commenced.

Liberal Construction.—Niceties in pleading are not required in a justice's court. Accordingly, a liberal construction has been given to this section. If the defendant is informed of the nature of the plaintiff's demand against him, the requirement of this section is met. *Ladd Lime, etc., Co. v. Case*, 34 Ga. App. 190, 129 S. E. 6.

§ 4717. (§ 4118.) Summons, how served.

The statutory method of service is exclusive, and such a defendant can not be served by leaving a copy "at his office" unless his office is also his most notorious place of abode, or residence. *Bennett v. Taylor*, 36 Ga. App. 752, 754, 138 S. E. 273.

ARTICLE 6

Pleas and Defenses

§ 4726. (§ 4127.) Defendant may plead as in superior court.

Cited in *Owen v. Moseley*, 161 Ga. 62, 71, 129 S. E. 787.

ARTICLE 7

Evidence

§ 4730. (§ 4130). Accounts, how provided.

If the plea is not sworn to, it does not amount to the counter-affidavit provided by this section. *Dixon v. Holliman*, 37 Ga. App. 352, 353, 140 S. E. 384.

ARTICLE 8

Trial and Judgment

§ 4737. (§ 4137). Justice to give judgment.

Applied in *Cook v. Flanders*, 164 Ga. 279, 138 S. E. 218.

ARTICLE 9

Appeals and Juries

§ 4738. (§ 4138). Appeals, when and how entered.

Applied in *Armstrong & Bros. Co. v. Crane*, 37 Ga. App. 587, 588, 141 S. E. 217.

§ 4742. (§ 4142.) Appeals to the superior court.

Jurisdictional Amount as Affected by Counterclaim.—Although the plaintiff's claim be less than \$50, where a counter-claim is filed for more than \$50 but not exceeding the maximum jurisdictional amount of \$100, the defendant may appeal to the superior court. *Owens v. College Park Supply Co.*, 35 Ga. App. 618, 134 S. E. 179.

Applied in *Armstrong & Bros. Co. v. Crane*, 37 Ga. App. 587, 588, 141 S. E. 217.

ARTICLE 10

Claims, Garnishments, and Other Issues in Justices Courts

§ 4755. (§ 4155). Traverse of answer, and proceedings thereon.

When the plaintiff in *fi. fa.* files no exceptions or traverse to the answer of the garnishee, even though such answer be incomplete, the garnishee should be discharged. *Haney & Tinsley v. Owens*, 39 Ga. App. 462, 467, 147 S. E. 720.

ARTICLE 12

Justices Courts May Rule the Constables, etc.

§ 4763. (§ 4163). Constables may be ruled.

Cited in *Peek v. Irwin*, 164 Ga. 450, 139 S. E. 27.

CHAPTER 3

Ordinaries

ARTICLE 1

Ordinaries and Their Courts

§ 4786. (§ 4228.) Eligibility and disability of ordinary.

Extent of Prohibition upon Acting as Guardian.—The code provisions which prohibit an ordinary from acting as guardian of a minor do not prevent an ordinary from recovering in behalf of a minor money derived from benefit insurance where the act of 1918 authorizes an ordinary to receive and collect such money. *Foster v. Wood*, 36 Ga. App. 734, 137 S. E. 847.

ARTICLE 2

Jurisdiction of Courts of Ordinary

§ 4790. (§ 4232.) Jurisdiction, etc.

The distribution mentioned in this section refers to the distribution of the property of the intestate to persons who are entitled to receive the same at the time of distribution as heirs at law of the intestate. It has no reference to any other distribution of the property of the intestate to persons other than heirs who may have some title to it or equitable claim therein. *Burgamy v. Holton*, 165 Ga. 384, 391, 141 S. E. 42.

Cited in *Coleman v. Hodges*, 166 Ga. 288, 290, 142 S. E. 875.

ARTICLE 3

Jurisdiction over County Affairs

§ 4796. (§ 4238). Authority over county matters.

See notes to § 1551(133).

ARTICLE 4

Other Authority of Ordinary

§ 4804(1). **Custody and distribution when no legal guardian.**—The ordinaries of the several counties of this State be and they are hereby made and constituted the legal custodians and distributors of all moneys due and owing to any minor child or children, idiots, lunatics, insane persons, and persons non compos mentis, who have no legal and qualified guardian, to receive and collect all such moneys due or owing to such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, arising from such insurance policies, benefit societies, legacies, inheritances, or from any other source; provided, that the amount due such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis from all sources does not exceed the amount of five hundred dollars, without any appointment or qualifying order, he is authorized to take charge of such money or funds for such minor or minors, idiots, lunatics, and insane persons and persons non compos mentis, by virtue of his office as ordinary in the county of the residence of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, and the certificate of such ordinary, that no legally qualified guardian has been so appointed and that the estate of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, from all sources, does not exceed the amount of five hundred dollars (\$500.00), shall be conclusive, and shall be sufficient authority to justify any debtor or debtors in making payment of monies due as aforesaid, claims therefor having been made by such ordinary. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—The amendment of 1927 constituted the ordinaries custodian and distributor of moneys due and owing to idiots, lunatics, insane persons and persons non compos mentis.

Collection of Benefit Insurance.—The code provisions which prohibit an ordinary from acting as guardian of a minor do not prevent an ordinary from recovering in behalf of a minor money derived from benefit insurance where this act authorizes an ordinary to receive and collect such money. *Foster v. Wood*, 36 Ga. App. 734. 137 S. E. 847.

§ 4804(2). **Employment of counsel.**—The ordinary of the county of the residence of such (minor or minors), idiots, lunatics, insane persons, and persons non compos mentis is hereby authorized and permitted, in his discretion, to employ counsel to bring suit to recover any amount due such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, in the name of such ordinary as guardian for such minor or minors, idiots, lunatics, insane persons and persons non compos mentis, in any court having jurisdiction thereof, and such ordinary shall have authority to pay such counsel so employed a reasonable fee for his services in such matters, which is necessary to enforce the right of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, out of the funds so collected. Acts 1918, pp. 198, 199; 1927, p. 258.

Editor's Note.—The ordinary of the county of residence of "idiots, lunatics, insane persons and persons non compos mentis" was brought within the operation of this section by the amendment of 1927. In amending the section the words "minor and minors," which appeared immediately before the above referred insertion, were inadvertently, it is believed, left out. The preliminary statement of the amendatory act directs no such omission, and from a reading of the section as a whole it becomes evident that it was not the intention of the legislature to leave out those words. Hence they are inserted parenthetically at the place where they originally appeared.

§ 4804(4). **Record open to inspection.**—It shall be the duty of such ordinaries to keep a well-bound book properly indexed, in which a complete record shall be kept of all money received by him for such minor or minors, idiot, lunatic, insane persons, and persons non compos mentis; said record shall show from what source said funds were derived, and to show to whom and for what such money was paid, which book shall be open for inspection of the public at all times, as other records in his office Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—By the amendment of 1927, the ordinary is required to keep record of moneys received for idiots, lunatics, insane persons and persons non compos mentis.

§ 4804(6). **Payment authorized.**—The ordinary receiving such funds is hereby authorized and directed to pay out said funds so received by him, or whatever amount he may think necessary, for the support, education, and maintenance of such minor or minors, idiots, lunatics, and insane persons and persons non compos mentis, as he may think in his judgment proper and right, and when so expended shall be final, and no liability shall attach to such ordinary or his bondsmen by reason of such expenditures when properly done. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—The provision as to the payment for the support, education, etc., of idiots, lunatics, insane persons and persons non compos mentis, was introduced by the amendment of 1927.

§ 4804(7). **Deposit of funds.**—When any such funds shall come into the hands of the ordinary of any county, belonging to such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, and there shall be no cause or necessity arising for the payment out of said funds for support, education, and maintenance of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, then in that event it shall be the duty of such ordinary to place said funds in some good and solvent bank, in the savings department of such bank at the then current rate of interest allowed on saving deposits, and when so deposited there shall be no further liability against such ordinary or his bondsmen when such deposit is made in good faith. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—The amendment of 1927 extended the operation of this section to funds of idiots, lunatics, insane persons and persons non compos mentis.

CHAPTER 5

City Courts

ARTICLE 1

Judges May Exchange

§ 4828. Judges may exchange.

A judge of a city court can preside in another city court and try all cases in which the "home" judge is disqualified or which he is providentially prevented from trying. However, the "visiting" judge, while so presiding, has no authority to try a case which the home judge is not disqualified to try or which he is not providentially prevented from trying, unless both parties to the cause consent to such trial. *Rowland v. State*, 38 Ga. App. 131, 142 S. E. 917; *Rowland v. State*, 38 Ga. App. 135, 142 S. E. 919.

CHAPTER 5A

City Courts Established upon Recommendation of Grand Jury

ARTICLE 1

Organization and Jurisdiction

§ 4831(b). Park's Code.

See § 4831(2).

§ 4831(2). (§ 4271). Jurisdiction.

Applied in *Myrick v. Dixon*, 37 Ga. App. 536, 140 S. E. 920.

CHAPTER 6

The Superior Courts and Their Officers

ARTICLE 1

The Superior Court and Its Judges

§ 4839. (§ 4315.) Must hold courts as prescribed by law.

Reference. — As to terms in *McDuffie*, *Bryan*, *Bacon*, *Dougherty*, *Echols*, *Forsyth*, *Jeff Davis*, *Jenkins*, *Lamar Building*, *Pulaski*, *Robin*, *Tift*, *Turner*, see acts of 1927 pp. 175, et seq.

Effect of Sitting in Wrong County.—A charter, granted by a court sitting in a county other than the one prescribed by law, is void. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S. E. 517.

§ 4847. (§ 4318). Written charges.

The act of 1925 creating the municipal court of Macon, permitting oral charges to the jury is not unconstitutional because in conflict with this section. *Robinson v. Odom*, 168 Ga. 81, 147 S. E. 569.

§ 4849. (§ 4320.) Jurisdiction of superior courts.

To Compel Attendance of Witness. — This section is not applicable to a situation where a witness having been subpoenaed to attend the superior court, fails to do so, and the court proceeds by attachment to compel his attendance and punish him by a fine not exceeding three hundred dollars; this being governed by section 5852. *Pullen v. Cleckler*, 162 Ga. 111, 132 S. E. 761.

Applied in *Jones v. State*, 39 Ga. App. 1, 4, 147 S. E. 806.

§ 4850. (§ 4321.) Judges may grant writs of certiorari, etc.

Cross Reference.—As to the enforcement by the judge of delivery of property to receiver, see annotations to section 5475.

§ 4858. (§ 4329.) Judge appointed by clerk when.

Under proper construction of this section considered with §§ 4855 and 4857 when a case in the superior court in which the judge is disqualified is reached in its order on the call of the docket for trial, if the judge has not in fact procured the services of another judge and if the parties to the case have not selected an attorney at law to preside in the case, it is the duty of the clerk, or, in his absence, of the deputy clerk, "to select some competent attorney practicing in that court" to preside in the case. It is not essential to the validity of the act of the clerk in selecting the attorney to try the case that an effort should have been made by the judge to procure the services of another judge; or that the parties must have attempted and failed to agree in the selection of an attorney to try the case; or that the order appointing the attorney should first be spread upon the minutes of the court; or that one of the parties who was absent at the time of the selection by the clerk was not notified by his adversary of his intention to demand that the clerk select an attorney to preside in the case. The foregoing decision comports with the principle ruled in *Beck v. Henderson*, 76 Ga. 360; *Steam Laundry Co. v. Thompson*, 91 Ga. 47, 16 S. E. 198. The request to review and overrule the decision in *Beck v. Henderson* is denied. *Robinson v. McArthur*, 166 Ga. 611, 144 S. E. 19.

§ 4863. (§ 4334.) Judge expressing opinion on facts, error.

I. EDITOR'S NOTE AND GENERAL CONSIDERATION

Applied in *Millsaps v. Strange Co.*, 37 Ga. App. 716, 141 S. E. 513; *Spivey v. State*, 38 Ga. App. 213, 214, 143 S. E. 450.

II. WHAT CONSTITUTES.

Contentions of the Parties.—Instructing the jury as to what the court understood to be the contentions of the parties, is not an expression of opinion. *McArthur v. Ryals*, 162 Ga. 413, 418, 134 S. E. 76.

Instruction as to Circumstantial Evidence, Held as Error as Expression of Opinion.—*Cook v. State*, 36 Ga. App. 582, 137 S. E. 640.

Assumption of Commission of Crime.—There being nothing in the evidence or in the defendant's statement to dispute the facts that the alleged crime was committed, and his defense resting solely upon the contention that he did not participate in the offense, the court, in charging the jury, did not violate the provisions of this section in assuming that a crime had been committed. *Pruitt v. State*, 36 Ga. App. 736, 138 S. E. 251.

Language of judge on trial for divorce and alimony, held no expression or intimation of opinion. *Tribble v. Tribble*, 166 Ga. 850, 144 S. E. 665.

IV. ILLUSTRATIVE CASES.

"You Seem to Be Fishing Anyhow" Not Expressive of Opinion.—The use of the sentence by the court "well go ahead and use him (the witness); you seem to be fishing anyhow," was, under the circumstances of the case, held not to be an intimation of opinion by the judge. *Richardson v. State*, 161 Ga. 640, 131 S. E. 682.

§ 4864. Within what time judges shall decide motions.

Provision Directory.—The provision as to the duty of the

judge to notify counsel of the overruling of a motion for a new trial, is directory only, and will not suffice, when considered in connection with section 6152, to extend the time prescribed therein for presenting bills of exception for approval. *Burnett v. McDaniel & Co.*, 35 Ga. App. 367, 133 S. E. 268.

ARTICLE 2

Judicial Districts and Circuits

§ 4870. (§ 4339.) **Thirty-three judicial circuits.**—The entire state is divided into thirty-three judicial circuits, in reference to the jurisdiction and sessions of the superior court, as follows, to wit:

Augusta Circuit, composed of the counties of Burke, Columbia, and Richmond. Acts 1807, p. 38; 1927, p. 175.

Toombs Circuit, composed of the counties of Glascock, Lincoln, McDuffie, Taliaferro, Warren, and Wilkes. Acts 1910, p. 63; 1927, p. 175.

Editor's Note.—The county of McDuffie was added to Toombs Circuit by the amendment of 1927. The paragraphs here set out were the only ones affected. This act makes provisions so as not to affect the rights of solicitor general during the present time.

ARTICLE 3

Sessions and Adjournments of Superior Courts

§ 4877. (§ 4346.) **Terms adjourned five days before next term.**

Motion for New Trial Goes to Next Term.—The preceding term of the court stands adjourned by operation of law five days prior to the commencement of the succeeding term; and a motion for new trial made in one term automatically goes over to the next regular term, and the judge is without jurisdiction to dismiss it in vacation. *Marshall v. State*, 34 Ga. App. 434, 129 S. E. 665.

ARTICLE 4

Clerks of Superior Courts

§ 4893. (§ 4362.) **May administer oaths, etc.**

Applied in *Myrick v. Dixon*, 37 Ga. App. 536, 140 S. E. 920.

§ 4897. (§ 4366.) **May be removed.**

Pleading—Particularity of Charges.—Where the petition alleges that the acts of misconduct which are grounds for removal are illustrated in detail by a certain auditor's report on file in the office of the clerk of the superior court (who is the defendant), and which is referred to in the petition as an exhibit, the charges are alleged with a degree of particularity sufficient to put the defendant on notice. *Wallace v. State*, 34 Ga. App. 281, 129 S. E. 299.

Part of Default in Other Capacity than Clerk of Superior Court.—Although it may appear from the petition and exhibits that a certain part of the money collected was collected by the clerk in his capacity of clerk of the city court, and that certain of the records alleged to have been improperly kept were improperly kept by him as clerk of the city court, the petition sets out sufficient grounds for his removal as clerk of the superior court. *Wallace v. State*, 34 Ga. App. 281, 129 S. E. 299.

But he can not, by reason of any misconduct on his part in the discharge of the duties devolving on him as ex-offi-

ficio clerk of a city court, be removed from office by the judge of the superior court, as is provided in this section. *Wallace v. State*, 34 Ga. App. 281, 129 S. E. 299.

§ 4901(6). **Endorsement of plat for laying out street or highway; report of city planning commission.**—In any county having a population of 60,000 or more inhabitants by the last United States Census, it shall be unlawful to record or receive for record in the office of the clerk of the superior court any map or plat for the laying out of any street or highway unless it bears the endorsement thereon of the commissioners of roads and revenues, provided that if the land to be platted is located within a city having a city planning commission established by charter, or outside of such city within six (6) miles of the limits thereof, such endorsement shall be by the mayor and general council of such city. Before approving a plan or plat of such subdivision of land, the commissioners of roads and revenues or the mayor and general council, shall consider the location, widths and grades of the proposed streets or highways within or adjacent to such subdivision. Each such subdivision of land shall have adequate means of access to the lots therein from the public streets or highways and shall be so laid out as to provide for the continuation of existing streets and highways and for the proposed highway widenings deemed necessary in the public interest by such commissioners of roads and revenues or such mayor and general council and shall be so laid out as to permit of an appropriate subdivision of adjoining properties; provided that such commissioners or such mayor and general council may waive or modify any of the above conditions or requirements wherever owing to the peculiar shape or location of the land such condition or requirement cannot in the judgment of such commissioners or of such mayor and general council reasonably be demanded with due regard to the appropriate development of the land to be subdivided. Any such map must first be submitted to the city planning commission for consideration and report to the mayor and general council provided the property thus platted is located within such city or within six miles of the limits thereof. The foregoing provisions shall likewise apply when any person in said territory desires to construct sewers or disposal plants or similar construction for the disposal of sewerage. In such event the provisions of this section apply, so that the plans for the construction of said sewerage and disposal plants must be approved in the same manner as is provided for the approval of plats and the penalty provided in section 4901(7) shall apply to all improvements and any subdivisions wherein sewers or disposal plants as herein provided are constructed; the same penalty concerning same shall apply for failure to have the plans for the same approved before being installed as applies to selling land as herein provided with reference to recording plats. Acts 1921, pp. 216, 219; 1923, p. 111; 1927, p. 318.

Editor's Note.—The last two sentences of this section are new with the amendment of 1927.

The Act of 1927 makes no reference to the Act of 1923 which reduced the required population from 200,000 to 60,000 but amends the original act, enacted in 1921. Although

the Act of 1927 fixes the required population at 200,000 or more in view of the Act of 1923 it would seem that 60,000 is the intended minimum.

ARTICLE 5

Sheriffs and Their Duties

§ 4905. (§ 4371). Oath of office.

In this section the article "the" is used before the noun "judge." It would not be a proper construction of the language, "the judge of the superior court," to hold that in a county, such as Fulton, where there are five superior-court judges, this oath could not be administered to the Sheriff by any one of these judges, for the reason that the statute requires this oath to be administered by "the judge," when in fact there was no such judge in Fulton county. This is a familiar illustration of the fact that the article "the," as used in statutes, is often used in the sense of any. *Howell v. State*, 164 Ga. 204, 241, 138 S. E. 206.

§ 4915. (§ 4381.) Sheriffs may execute justice-court processes.

Applied in *McBrien v. Harris*, 39 Ga. App. 41, 145 S. E. 919; *Parrish v. Barwick*, 167 Ga. 214, 216, 144 S. E. 735.

CHAPTER 7

Attorneys at Law

ARTICLE 10

General Principles

§ 4954. (§ 4416). Liability of attorneys to be ruled.

Relationship Necessary.—Certain facts held not to constitute the relation of attorney and client, and application of section denied. *Smith v. International Lawyers*, 35 Ga. App. 158, 132 S. E. 245.

§ 4956. (§ 4418.) Limitation on authority.

This section is sound law based upon sound policy. A violation of that law is an act contrary to public policy, and for that reason it cannot become law merely through the violation of the law whether by an attorney or an administrator. *Pate v. Newsome*, 167 Ga. 867, 878, 147 S. E. 44.

Burden of Proof.—Where the defendant to a suit contends that he settled the claim by paying the plaintiff's attorney less than the full amount thereof, the burden is upon the defendant to show affirmatively that the plaintiff's attorney had special authority from his client to make the settlement. *High v. Hollis*, 35 Ga. App. 195, 132 S. E. 260.

Applied in *Rawls v. Heath*, 36 Ga. App. 372, 376, 136 S. E. 822.

§ 4957. (§ 4419.) Improper conduct by counsel.

On the trial of an indictment for murder it was error to allow the solicitor-general, over objections of defendant's counsel, to argue to the jury that "statistics compiled by reliable authorities, published in a book which he (the solicitor-general) had and could produce, showed that Georgia had 561 murders in 1922," and to argue to the jury in consequence thereof to strictly enforce the law in the case on trial and to impose the capital penalty. *Fair v. State*, 168 Ga. 409, 148 S. E. 144.

Having instructed the jury that the argument of counsel that another than the defendant would have to pay the

verdict rendered against the defendant was improper and should not be considered by them, the court did not err in overruling the motion for a mistrial. *Atlanta, etc., R. Co. v. Smith*, 38 Ga. App. 20, 142 S. E. 308.

IV. MISTRIAL.

B. Instructions Remedying Improper Remarks.

See *Furney v. Tower*, 36 Ga. App. 698, applying the principle stated under this analysis line in the Code.

ARTICLE 11

Proceedings to Remove Attorney

§ 4976. (§ 4438). Plea or refusal to answer.

Cited in *Garrard v. Milledgeville Banking Co.*, 168 Ga. 339, 342, 147 S. E. 766.

CHAPTER 8

Stenographers

§ 4985. (§ 4447.) Compensation in civil cases.

Assessment of Costs against Public Treasury.—The court cannot assess the cost of stenographic reports against the public treasury in a civil case between private parties. *Macris v. Tsipourses*, 35 Ga. App. 671, 134 S. E. 621.

§ 4989(a). Park's Code.

See § 5989(3).

SECOND TITLE

Special Rights, Remedies, and Proceedings

CHAPTER 1

Appeals

ARTICLE 1

In What Cases Allowed

§ 4998. (§ 4453). Appeals lie in what cases.

Cross Reference.—See annotations to § 4742.

§ 5000. (§ 4455). Appeal when to be entered.

See notes to § 5113.

When Section Applicable.—Unless there are provisions made where a greater or less time is fixed for entering appeals in particular cases, the general provision of this section will control. *Hughes v. State Board*, 162 Ga. 246, 253, 134 S. E. 42.

ARTICLE 3

Effect of Appeals

§ 5015. (§ 4470.) Effects of appeal.

Applied to Judgment of Justice's Court.—Upon appeal the

judgment of justice's court remains operative with all of its incidents, save in so far as it is incapable of enforcement pending the appeal. *Haygood v. King*, 161 Ga. 732, 132 S. E. 62.

§ 5022. (§ 4477.) Arbitrators limited by submission.

Cited in *United States Fidelity, etc., Co. v. Corbett*, 35 Ga. App. 606, 612, 134 S. E. 336.

CHAPTER 3

Of Attachments

ARTICLE 1

Of Issuing Attachments

§ 5055. (§ 5410). Grounds of attachment.

To Invoke Equitable Remedies.—A declaration in attachment may invoke equitable remedies and relief under § 5406. *Coral Gables Corporation v. Hamilton*, 168 Ga. 191, 147 S. E. 494.

§ 5056. (§ 4511.) By whom affidavit may be made.

Cross Reference.—For affidavit as to garnishment, see § 5269.

§ 5060. (§ 4515). Attachment, who may issue.

Cited in dissenting opinion in *Lane v. Bradfield*, 37 Ga. App. 395, 396, 140 S. E. 417.

ARTICLE 2

In What Manner, on What Property Executed, and Proceedings Thereon

§ 5075. (§ 4530). Duty of the officer to whom the attachment is directed.

Cited in *Lane v. Bradfield*, 37 Ga. App. 395, 396, 140 S. E. 417.

ARTICLE 4

Attachments against Fraudulent Debtors.

§ 5088. (§ 4543). Attachments where debtor is fraudulently disposing of his property.

See § 6139(1).

Applied in *Young v. Cochran Banking Co.*, 166 Ga. 877, 878, 144 S. E. 652.

ARTICLE 5

Proceedings on Garnishment in Attachment

§ 5094. (§ 4549). Garnishment, how obtained.

Cited in *Owen v. Moseley*, 161 Ga. 62, 64, 129 S. E. 787.

§ 5097. (§ 4551). If the garnishee fails to answer, etc.

If, under the provisions of this section, a formal motion on the part of the plaintiff is necessary to a valid judgment against a garnishee in default (*Owen v. Moseley*, 161 Ga. 62, 129 S. E. 787), where such judgment has in fact been rendered it will be presumed, nothing to the contrary appearing, that the judgment was rendered when the garnishment case was reached in its order on the docket and upon motion of the plaintiff. *Brumbelow Heating & Plumbing Co. Inc. v. Atlanta Furniture Co.*, 39 Ga. App. 72, 146 S. E. 639.

Applied in *Myrick v. Jones-Stewart Motor Co.*, 39 Ga. App. 614, 616, 147 S. E. 917.

ARTICLE 6

Of Pleadings and Defenses in Attachment

§ 5104. (§ 4558). Defendant may make his defense.

Applied in *Hattaway Lumber Co. v. Southern Lumber Co.*, 39 Ga. App. 741, 148 S. E. 358.

§ 5107. (§ 4561.) No traverse shall delay plaintiff.

Disposal of Traverse.—Notwithstanding this section, a traverse to the grounds of attachment should be first disposed of, unless it be continued for cause. This provision of the Code simply means that nothing that works a continuance of the traverse only shall postpone the main case. *Alvaton Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S. E. 781.

Effect of Finding Issue in Defendant's Favor.—When an issue on a traverse is found in favor of the defendant, all he gains is that the levy falls, and if a judgment is obtained on the merits it does not date from the time of the levy as provided by § 5124, but it would take lien on the property attached as well as on other property, from the date of the judgment only. *Blakely Milling, etc., Co. v. Thompson*, 34 Ga. App. 129, 128 S. E. 688.

ARTICLE 7

Replevy and Disposition of Property Attached

§ 5113. (§ 4567.) Defendant may replevy property, officer's duty.

Bond Required only After Levy.—The bond provided for in this section is required only after the levy of the attachment, and not after judgment on the attachment against the property. *Lafferty Lumber Co. v. Thomas*, 37 Ga. App. 226, 139 S. E. 587.

Validity of Bond Dependent on Validity of Attachment.—The validity of a replevy bond filed by a defendant in attachment as provided in this section, is dependent upon the validity of the attachment; and where the attachment has been dismissed, no liability attaches against the surety on the replevy bond, notwithstanding the plaintiff in attachment may, after obtaining jurisdiction in personam over the defendant, have proceeded with the suit and obtained a common-law judgment thereon against the defendant. Anything to the contrary contained in *Blakely Milling & Trading Co. v. Thompson*, 34 Ga. App. 129, 128 S. E. 688, must yield to the superior authority of the Supreme Court as expressed supra, which under the constitution of this State is controlling. *Burnette v. Johnson*, 38 Ga. App. 396, 144 S. E. 36.

Effect of Bankruptcy.—Where, upon the levy of an attachment for purchase-money, the defendant replevied the property by giving bond and security as provided in this section, and where within four months after the levy of such attachment the defendant was adjudicated a bankrupt, the lien of the attachment was void, and the principal debtor and the surety on the replevy bond were both dis-

charged. *Longshore v. Collier*, 37 Ga. App. 450, 140 S. E. 636.

Cited in *Blakely Milling, etc., Co. v. Thompson*, 34 Ga. App. 129, 128 S. E. 688.

ARTICLE 9

Of Lien of Attachments, Judgment and Execution

§ 5124. (§ 4578.) Lien of attachments.

Cross Reference.—See annotations to § 5107.

CHAPTER 4

Auditors

ARTICLE 1

Appointment and Powers

§ 5127. (§ 4581.) Auditor instead of master.

Applied as to reference to auditor by the judge of his own motion. *Darien Bank v. Clifton*, 162 Ga. 625, 134 S. E. 619.

Applied also in *King v. Bank*, 166 Ga. 463, 143 S. E. 423.

§ 5128. (§ 4582.) Auditor at law.

Cited in *Holston Box, etc., Co. v. Vonberg*, 34 Ga. App. 298, 129 S. E. 562.

§ 5129. (§ 4583.) Powers of auditor.

Cited in *Ellis v. Geer*, 36 Ga. App. 519, 520, 137 S. E. 290.

ARTICLE 3

Exceptions

§ 5136. (§ 4590.) Exceptions as to matters not in record.

Exceptions at Law Must Be Verified.—The grounds upon which these exceptions at law are based must be verified by reference to the auditor's report; and if the report affords no means of verification, the exceptions can not be considered, unless otherwise certified by the auditor. *Patterson v. Burtz*, 39 Ga. App. 139, 143, 146 S. E. 330.

Applied in *Patterson v. Burtz*, 39 Ga. App. 139, 142, 146 S. E. 330.

§ 5139. (§ 4593.) Report may be recommitted.

Cited in *Holston Box, etc., Co. v. Vonberg*, 34 Ga. App. 298, 300, 129 S. E. 562.

ARTICLE 4

Hearing of Exceptions and Final Disposition of Case

§ 5141. (§ 4595.) Jury trial, when.

Constitutionality.—The provision in this section is not unconstitutional for the alleged reason that it violates the

constitution, § 6545. *Bank of Lumpkin v. Farmers State Bank*, 167 Ga. 766, 146 S. E. 754.

Right to Jury Trial without Demand in City Court.—This section is a general law, but must be construed with reference to the local statute creating the city court of Lexington, providing how a jury trial in causes pending therein may be dispensed with. It seems that the local statute would apply to trials of exceptions of fact to an auditor's report; that is, there must be a demand for jury trial. *Shehane v. Wimbish*, 34 Ga. App. 608, 612, 131 S. E. 104.

§ 5146. (§ 4600.) What evidence to be read to jury, and of verdict.

Presumption and Burden of Proof.—Auditor's findings are prima facie true, and the burden of overcoming them is on the exceptor. *McDonald v. Dabney*, 161 Ga. 711, 712, 132 S. E. 547.

CHAPTER 5

Bail in Actions for Personalty

§ 5150. (§ 4604.) Bail in trover.

Cited in *Hoffman v. Lynch* (Ga.), 23 Fed. (2d) 518.

§ 5153. (§ 4607.) Perishable property, how sold.

Applied as to amount of recovery in action of trover. *Standard Motors Finance Co. v. O'Neal*, 35 Ga. App. 727, 134 S. E. 843.

§ 5154. (§ 4608.) Release of defendant without security, when.

Time of Giving Notice.—The giving of "five days notice of the time and place of hearing," required by this section is not complied with by serving the plaintiff, on the first day of May, with notice of hearing on the fifth day of May following. From the first day of May to the fifth day of May is only four days. *Hardin v. Mutual Clothing Co.*, 34 Ga. App. 466, 129 S. E. 907.

Failure to Answer No Waiver.—Where a defendant petitions the court for a discharge, and the respondent fails to file a written answer to the petition, the respondent is not to be considered as in default, but may appear and introduce evidence in rebuttal of that offered by the petitioner. *Harris v. Hines*, 35 Ga. App. 414, 133 S. E. 294.

CHAPTER 6

Of Claims to Property in Execution

ARTICLE 1

How and by Whom Interposed

§ 5157. (§ 4611.) Claims to be on oath.

Applied in *Becker v. Truitt*, 39 Ga. App. 286, 146 S. E. 654.

ARTICLE 2

When, Where, and How Tried

§ 5167. (§ 4621.) Where claim to be returned.

Where an execution is levied upon personalty, and the property is claimed by a third person, the execution, with

the entry of the officer, and the claim, form the pleadings, and it is not necessary for the plaintiff, on the trial of the right of property, to introduce the execution in evidence. *Nelson v. Brannon*, 32 Ga. App. 455, 123 S. E. 735; *Bacon v. Hinesville Bank*, 38 Ga. App. 422, 144 S. E. 125.

§ 5168. (§ 4622). Tried by petit jury.

Sections 5168 and 5926 construed together in *Callaway v. Life Ins. Co.*, 166 Ga. 818, 144 S. E. 381.

§ 5169. (§ 4623). Oath in claim cases.

A charge in a claim case, that if the jury believed that the claim was interposed for delay only, they should award damages to the plaintiff against the claimant, is a correct statement of the law. The charge is not subject to the exception that it was incorrect and tended to confuse the jury, to the prejudice of the claimant's case, and that the court in so charging erred in ignoring other phases of the case than that of delay. *Nesmith v. Nesmith*, 37 Ga. App. 779, 142 S. E. 176.

§ 5170. (§ 4624.) Burden of proof on plaintiff.

Burden is on claimant, when defendant in fi. fa. is in possession to show his title to the property in defendant's possession. *Jones Motor Co. v. Finch Motor Co.*, 34 Ga. App. 399, 129 S. E. 915.

Burden on Plaintiff in Fi. Fa. When Possession Unknown.—Where it does not appear in whose possession the property was found, the burden of proof is upon the plaintiff in fi. fa. *Singer Sewing Mach. Co. v. Crawford*, 34 Ga. App. 719, 131 S. E. 103.

Recital that Defendant Was in Possession.—A recital in an entry of levy that defendant was in possession of the property at time of levy makes a prima facie case on issue raised by claim interposed. *Thompson v. Vanderbilt*, 166 Ga. 132, 142 S. E. 665.

Applied in *Peterson v. Wilbanks*, 163 Ga. 742, 753, 137 S. E. 69; *Blount v. Dunlap*, 34 Ga. App. 666, 130 S. E. 693.

CHAPTER 8

Of the Writ of Certiorari

ARTICLE 2

How Obtained, and Proceedings Thereon

§ 5181. (§ 4635.) From the court of ordinary.

Noncompliance Ground of Dismissal.—Noncompliance with the requirements of setting forth "plainly and distinctly the error complained of," and failure to set forth the grounds of the motion for a new trial or attach them to the petition as an exhibit, is a ground for dismissal. *East River Nat. Bank v. Ellman*, 36 Ga. App. 263, 136 S. E. 799.

§ 5183. (§ 4637). From justices and other inferior judicatories.

Under the provisions of this section of the Civil Code, requiring that a petition for certiorari "shall plainly and distinctly set forth the errors complained of," a mere general averment of error, in connection with which there is no statement or assignment whatever as to how or where in the rulings complained of were erroneous, presents no case or question for decision by the judge of the superior court. *Chan v. Judge*, 36 Ga. App. 13, 134 S. E. 925; *Davis v. Lee*, 38 Ga. App. 667, 145 S. E. 110.

Applied in *Thompson v. Savannah Bank and Trust Co.*, 39 Ga. App. 809, 148 S. E. 621.

§ 5185. (§ 4639.) Bond and security to be given.

I EDITOR'S NOTE AND GENERAL CONSIDERATION. Effect of Inability of Bond Attached to Petition.—The fil-

ing with the clerk of the superior court of the certiorari bond required under this section being a condition precedent only to the issuance of the writ and not to the sanction of the petition for certiorari, the certiorari is valid as respects any requirement as to the giving and filing of the bond, where a valid legally required bond is filed with the clerk of the superior court prior to the issuance of the writ, notwithstanding the bond attached to the petition may be invalid. *Gragg Lumber Co. v. Collins*, 37 Ga. App. 76, 139 S. E. 84, citing *Smith v. McCranie*, 14 Ga. App. 721, 82 S. E. 307.

II. EXECUTION, ATTESTATION, SIGNATURE AND SEAL.

The judge of the superior court did not err in dismissing a petition for certiorari which was accompanied by a certificate as to the payment of costs, signed only by the deputy clerk of the municipal court. *Thoms v. Thompson Co.*, 38 Ga. App. 779, 145 S. E. 533.

There is nothing in the act creating the municipal court of Atlanta, or in any of the acts amendatory thereof, which could be taken to change the rule with respect to the necessity of signing such certificate by the officer whose decision is the subject-matter of complaint. *Thoms v. Thompson Co.*, 38 Ga. App. 779, 145 S. E. 533.

IV. PAYMENT OF COSTS AND CERTIFICATE.

Certificate—Sufficiency of.—A certificate made by the judge whose judgment is the subject matter of complaint, that "the petitioner has paid all accrued costs to this date in the sum of \$9.25" is sufficient as a compliance with this section. *Whitley v. Jackson*, 34 Ga. App. 286, 129 S. E. 662.

§ 5187. (§ 4641.) Affidavit in lieu of bond.

What Must Affidavit State.—The affidavit should allege that owing to his poverty the affiant is unable to give the required security; merely stating that the affiant "is unable to give the security, as required by law," is not sufficient, and the affidavit not being amendable, the certiorari is void. *Roberts v. Selman*, 34 Ga. App. 171, 128 S. E. 694.

§ 5188. (§ 4642.) Must be applied for in thirty days.

Judgment Sustaining Demurrer Not Final Determination.—A judgment sustaining a demurrer to a petition, which grants leave to the plaintiff to amend on pain of dismissing the suit, is not a final judgment, and certiorari does not lie thereto. *Messengale v. Colonial Hill Co.*, 34 Ga. App. 807, 131 S. E. 299.

Applied in *Towery v. McCaysville*, 38 Ga. App. 85, 142 S. E. 702.

§ 5190. (§ 4644.) Ten days notice to the adverse party.

Immaterial Variance between Process and Record.—A defendant in certiorari being entitled only to written notice of the sanction of the writ of certiorari and the time and place of hearing, and not to service of a copy of any of the proceedings, it is immaterial that a copy of the proceedings served, showed as surety upon the certiorari bond a name different from that appearing as surety upon such bond as it appeared of record. *Whitley v. Jackson*, 34 Ga. App. 286, 129 S. E. 662.

Sufficiency of Notice.—Notice of sanction and of the time and place of hearing of a petition for certiorari may be established otherwise than by an acknowledgment of service or other proof of notice appearing upon the petition itself. *McAlister v. State*, 77 Ga. 599, 3 S. E. 163; *Jones v. Gill*, 121 Ga. 93, 48 S. E. 688. The notice may, upon the hearing of the certiorari, be established otherwise by proper proof, such as a written acknowledgment of service, signed by one of the attorneys for the defendant in certiorari, reciting that the written notice required under this section of the Civil Code of 1910 has been made as required by law. *McDaniel v. Farmers & Merchants Bank*, 37 Ga. App. 782, 142 S. E. 178.

Applied in *Federal Life Ins. Co. v. Hurst*, 39 Ga. App. 808, 148 S. E. 614.

§ 5191. (§ 4645.) Shall operate as a supersedeas.

Cited in *Hargett v. Columbus*, 36 Ga. App. 628, 629, 137 S. E. 911.

ARTICLE 3

Of the Answer, Hearing, Judgment and Costs

SECTION 1

Of the Answer

§ 5195. (§ 4646.) Answer filed five days before the first day of term.

Applied in *Heinz v. Backus*, 34 Ga. App. 203, 205, 128 S. E. 915.

§ 5196. (§ 4647.) Exceptions to answer.

Certainty and Definiteness of Exceptions.—Exceptions must specify the defects. They must be so definite, apt, and certain that the magistrate may be able to understand the exact nature of the deficiency. *Macris v. Tsipourses*, 35 Ga. App. 671, 134 S. E. 621.

Method Prescribed by Section Exclusive.—An incomplete answer to a writ of certiorari can be perfected only by exceptions taken thereto in the manner prescribed by this section. *Macris v. Tsipourses*, 35 Ga. App. 671, 134 S. E. 621.

SECTION 2

Of the Hearing

§ 5199. (§ 4650.) Errors must be set forth.

A ground of motion for new trial that the verdict "is excessive" is too general. *Bart v. Scheider*, 39 Ga. App. 467, 469, 147 S. E. 430.

SECTION 3

Of the Judgment and Costs

§ 5201. (§ 4652.) Certiorari may be dismissed or returned.

Returning Case—Verdict Contrary to Evidence.—In a case when the only error alleged is that the verdict is contrary to the law and the evidence, it is erroneous to render a final judgment in petitioner's favor; for the reason that in such a case the error complained of is not "an error in law which must finally govern the case." *Tuten v. Towles*, 36 Ga. App. 328, 136 S. E. 537.

Final Decisions. — Under this section upon the hearing of a certiorari, wherever the case can be determined as a matter of law, the court must make a final disposition of it. Where it involves both law and facts, when there is no dispute as to the facts, the superior court may make a final disposition of the case. *Longshore v. Collier*, 37 Ga. App. 450, 140 S. E. 636.

Applied as to entering final decision where there is question of fact to be decided in the lower court. *Strickland v. American Nat. Bank*, 34 Ga. App. 549, 130 S. E. 598.

Cited in *Shehane v. Wimbish*, 34 Ga. App. 608, 613, 131 S. E. 104; *Flood v. Empire Inv. Co.*, 35 Ga. App. 266, 270, 133 S. E. 60; *Whitworth v. Carter*, 39 Ga. App. 625, 630, 147 S. E. 904.

§ 5203. (§ 4654.) Damage may be awarded.

Cited in *Flood v. Empire Inv. Co.*, 35 Ga. App. 266, 270, 133 S. E. 60.

CHAPTER 9

Condemnation of Private Property

ARTICLE 1

Notice, and to Whom Given

§ 5206. (§ 4657.) Taking private property.

Applied in *Central of Ga. Railway Co. v. Thomas*, 167 Ga. 110, 144 S. E. 739.

Cited in *Willcox v. State Highway Board*, 38 Ga. App. 373, 378, 144 S. E. 214.

§ 5209. (§ 4660.) Notice to owner.

Time for Appointment of Assessor.—Construing together this section and sections 5218, 5216, and 5219, the landowner has until the day fixed for the hearing in the notice in which to appoint his assessors, which hearing shall not be less than fifteen days from the time of serving the notice. A different ruling is not required by the decision in *City of Elberton v. Adams*, 130 Ga. 501, 61 S. E. 18, decided by five Justices. *Sheppard v. Edison*, 161 Ga. 907, 132 S. E. 218.

Applied in *Central of Georgia Railway Co. v. Thomas*, 167 Ga. 110, 144 S. E. 739.

§ 5216. (§ 4667.) How service effected.

See note to § 5209.

§ 5218. (§ 4669.) Direction and contents of notice.

See note to § 5209.

ARTICLE 2

Appointment of Assessors

§ 5219. (§ 4670.) When assessor to be appointed by ordinary.

See note to § 5209.

ARTICLE 4

To What Condemnations Applicable, Appeal, Final Judgment, etc.

§ 5229. (§ 4679.) Appeal not to delay, when.

Cited in *Gaston Shunk Plow Co.*, 161 Ga. 287, 304, 130 S. E. 580.

§ 5234(1). Condemnation for gas pipe-lines.—The power of eminent domain is hereby granted to and conferred upon persons who are or may be engaged in constructing or operating pipe-lines for the transportation and/or distribution of natural or artificial gas; and upon persons who are or may be engaged in furnishing natural or artificial gas for heating, lighting, and/or power purposes in the State of Georgia. Acts 1929, p. 219, § 1.

§ 5235 (§ 4685.) To what condemnation appli-

cable.—"The method of condemnation of property and assessment of damages hereinbefore provided shall apply to condemnation by cities, counties, railroads, telegraph, canal, mining, and waterworks companies, drainage by counties, tramroads, light-houses, and beacon constructions, and to all persons or corporations having the privilege of exercising the right of eminent domain. The method herein referred to shall also apply to persons who are or may be engaged in constructing or operating pipe-lines for the transportation and/or distribution of natural or artificial gas; and upon persons who are or may be engaged in furnishing natural or artificial gas for lighting, heating and/or power purposes in the State of Georgia."

The word "persons" as herein used in this section and 5234(1) shall include individuals, partnerships, associations, and corporations, domestic or foreign; and shall include the singular as well as the plural. Acts 1929, p. 220, § 2.

§ 5240. Water-power owners may condemn.

Editor's Note and General Consideration.—The question of the constitutionality of this section was suggested by counsel but not raised in *Rogers v. Toccoa Elect. Power Co.*, 163 Ga. 919, 137 S. E. 272.

Effect of Furnishing Power in Another State.—A corporation having the power of eminent domain under this section would not lose such power because it also furnished electric power in Tennessee. *Rogers v. Toccoa Elect. Power Co.*, 163 Ga. 919, 137 S. E. 272.

Injunction—Proper Remedy to Determine Power of Eminent Domain.—In a proceeding under this section the sole question to be passed upon by the assessors is the amount of compensation to be paid. In such proceedings the assessors can not pass upon the legal power of the company to institute such proceedings. The remedy of the landowner is to apply to a court of equity to enjoin the condemnation proceedings if they are unauthorized. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 526, 131 S. E. 517.

What Determines "Public Use."—Whether a purpose is a public or private purpose within the meaning of the law relating to eminent domain does not depend on use or the amount of use by the public, but upon the right of the public to such use. *Rogers v. Toccoa Elect. Power Co.*, 163 Ga. 919, 137 S. E. 272.

Applied in the case of electric power company. *Rogers v. Toccoa Elect. Power Co.*, 163 Ga. 919, 137 S. E. 272.

§ 5240(a). Park's Code.

See § 5240(1).

§ 5240(1). Condemnation of road or highway for power plant generating electricity.—Where any proceeding to condemn a public road or highway is instituted, if the same is a part of the State highway system, or jurisdiction or control thereof has been taken over or assumed by the State Highway Board or other State authority, the notice of intention to condemn shall be addressed to and served upon the chairman of the State Highway Board or such other officer as may hereafter be vested with the supervision and control of said State highway system; and if said road or highway is under the supervision or control of county authorities, the notice of intention to condemn shall be addressed to and served upon the ordinary, chairman of the board of commissioners of roads and revenues, commissioner of roads and revenues, or such other officer as is by law vested with jurisdiction over and control of the public roads of the county in which said road to be condemned is located. The

procedure in such condemnation of public roads and highways shall be the same as provided by the general laws of the State, as now embodied in section 5206 et seq. of the Code of Georgia and as the same may hereafter be amended, in so far as the same is not in conflict with the provisions of this section; and the public officer or officers to be notified and served as aforesaid shall act for and in behalf of the State or county, as the case may be, in the appointment of an assessor and in all other respects as provided in said general law of the State with respect to the owner or owners of property sought to be condemned. Provided, however, before any public road condemned under the provisions of this section can be used by the condemnor, the new road, including any and all bridges and culverts that may be necessary as a part thereof, shall be laid out and constructed by the condemnor and by the condemnor made ready for use by the public, all of which new construction shall be approved by the authorities having control of the road condemned; and provided further that the terms "public road" or "public highway," whenever used in this section or section 5240 shall include not only highways and roads proper, but bridges, culverts, and appurtenances as well. Acts 1927, p. 373.

§ 5243. Condemnation for public roads.

Additional Land for Road.—Whenever a public road is already established, and it becomes necessary to condemn land for the purpose of grading, improving, turnpiking, paving, widening, or macadamizing the same, for the use and convenience of the public, the county authorities must pursue the method laid down in this section. But when the State highway department wishes to condemn land for rights of way for State-aid roads, it is not required to, and can not, pursue this method. *Cook v. State Highway Board*, 162 Ga. 84, 98, 132 S. E. 902.

Meaning of "Improving."—The authority conferred by this provision of law to condemn lands for "improving" public roads within the meaning of that term as employed in the statute, is sufficient to authorize the county authorities to condemn a strip of land fifty feet wide and three hundred and thirty-four feet long, extending from the north line of an existing road to the east line of such road, near the point where said lines of the road form a sharp angle, in order that the road, when so "improved," shall follow a gradual curve and avoid the existing sharp angle in the road. *Parris v. Glynn County*, 167 Ga. 149, 144 S. E. 785.

§ 5245. Notice, how signed and served.

Not Affected by Sections 640 or 5246.—The proceedings for condemnation referred to above are not rendered inapplicable on account of the provisions in section 640, relating to procedure by county authorities for establishing a "new road or alteration in an old road." See *Cook v. State Highway Board*, 162 Ga. 84, 132 S. E. 902. Nor are such proceedings rendered inapplicable on account of the provision in § 5246, which declares that the county authorities after final judgment fixing damages to be paid for condemned property "may decline to accept the land so sought to be condemned." *Parris v. Glynn County*, 167 Ga. 149, 144 S. E. 785.

The notice required under this section is jurisdictional, and such notice should be given to the landowner by such county authorities, who should also name the date for the assessment. As the time fixed by the judge for the hearing has passed, the county authorities can now give a new notice and proceed with the assessment. The judgment is affirmed, with direction that the county authorities be permitted to give new notice of the time and place of hearing and proceed with the assessment of damages. *Parris v. Glynn County*, 167 Ga. 149, 144 S. E. 785.

ARTICLE 5

Condemnation on Petition of State or Federal Government

§ 5246(a). Park's Code.

See § 5246(1).

§ 5246(1). When petition authorized; procedure in case of doubt as to title.

Proceeding in Rem—Parties.—Under this section the State Highway Board can, in one proceeding, condemn a right of way over two tracts of land, one owned by one of the plaintiffs and the other owned by both plaintiffs, such proceeding being one in rem and not against individuals. In such a proceeding all persons interested will be allotted the damages to which they are respectively entitled. *Cook v. State Highway Board*, 162 Ga. 84, 132 S. E. 902.

The venue is in the county in which the land lies; but if the tract of land lies in two counties, such proceeding can be brought in the superior court of either county. *Cook v. State Highway Board*, 162 Ga. 84, 132 S. E. 902.

Necessity of Condemning All of Defendant's Land in One Proceeding.—In a proceeding to condemn a right of way and approaches to a public bridge on one side of the river, it is not a good objection to said proceeding that the plaintiffs would be entitled to recover damages for their lands lying on the opposite bank of said stream, the proceeding not being instituted to condemn a right of way over said lands. *Cook v. State Highway Board*, 162 Ga. 84, 132 S. E. 902.

Recovery for Injury to Ferry Right.—If this proceeding damages the plaintiffs by destroying any rights of ferry which they might have over said river, such damages can be assessed in the present proceeding. *Cook v. State Highway Board*, 162 Ga. 84, 132 S. E. 902.

CHAPTER 10

Dower

ARTICLE 1

Defined, How Assigned, How Barred, Etc.

§ 5249. (§ 4689). How barred.

Paragraph Three. — This paragraph is to be construed with the third paragraph of § 3931. When so construed as applicable to a case where an intestate has left a widow and child or children and an estate in realty, the widow is entitled, in distribution of the estate, to share in the realty with the child or children, provided within one year from the grant of letters of administration she elects to take a child's part in lieu of dower. *Federal Land Bank v. Henson*, 166 Ga. 857, 144 S. E. 728.

CHAPTER 11

Garnishments

ARTICLE 1

How Issued and Served; Answer; and What Is Subject to

§ 5265. (§ 4705). Garnishment.

Suit Pending—When.—A suit is pending, within the mean-

ing of this section, although a judgment may in fact have been rendered in the suit, when there still remains a legal possibility that the judgment may be reversed, as when a bill of exceptions to the judgment has been tendered and certified by the trial judge and has been filed with the clerk of the Court of Appeals. *Carrollton Bank v. Glass*, 35 Ga. App. 89, 132 S. E. 238.

§ 5268. (§ 4708). Garnishment, how obtained.

Cross References.—See annotations to succeeding section, and annotations under section 4392.

§ 5269. (§ 4709). How and by whom issued, etc.

I. GENERAL CONSIDERATION.

Applied in *Myrick v. Jones-Stewart Motor Co.*, 39 Ga. App. 614, 616, 147 S. E. 917.

II. SUMMONS, SERVICE AND RETURN.

Upon a Partnership.—Garnishments may be issued upon pending suits and summons of garnishments be served upon any "person" who is supposed to be indebted to, or who has in his possession property or effects belonging to, the defendant. A partnership is but an association of persons, and has always been amendable to suit at common law. *Ocilla Grocery Co. v. Wilcox, Ives & Co.*, 37 Ga. App. 718, 720, 141 S. E. 822.

III. ANSWER

Time of Filing Answer.—Where the garnishee fails to answer at the first and the second terms of court, but files an answer on the first day of the third term before the garnishment case has been called on the docket and before a motion has been made by the plaintiff to enter a judgment obtained during the second term, such answer is not too late. *Owen v. Moseley*, 161 Ga. 62, 129 S. E. 787.

§ 5272. (§ 4712). What is subject to garnishment.

Proceeds of Realty Sold by Execution.—If executors, empowered by will to sell lands of the decedent, sell them for the purpose of division, the proceeds are personalty, unimpressed with the character of real estate, and therefore are subject to garnishment. *Brown Guano Co. v. Bridges*, 34 Ga. App. 652, 130 S. E. 695.

§ 5273. Indebtedness accruing after service of summons.

See notes to § 5290.

Lien.—After the garnishment lien has been attached by the service of the summons, the garnishee will not be permitted to divest the lien in favor of the plaintiff by entering upon any sort of contract with the defendant whereby it is sought to divert the obligation from the defendant to another. *Gibson v. Motor Finance Co.*, 37 Ga. App. 392, 140 S. E. 424.

ARTICLE 4

Answer, Traverse, Claim, and Judgment

§ 5281. (§ 4719.) Answer of garnishee and judgment.

When Judgment May Be Entered on Dissolution Bond.—Where a garnishment is sued out pendente lite by the plaintiff and dissolved by the defendant, there can be no judgment rendered on the bond given to dissolve the garnishment until after judgment is rendered in the main action in favor of the plaintiff against the defendant therein. *Cone v. Glidden Stores Co.*, 36 Ga. App. 246, 136 S. E. 170.

Default Judgment against Garnishee.—Where a garnishment has been dissolved by the defendant in the main case, if the garnishee fails or refuses to answer, judgment by default may be rendered against him for such amount as may have been obtained by judgment against the defendant; and

upon such judgment against the garnishee being entered, judgment may be had for the amount thereof against the defendant and the sureties on the bond to dissolve the garnishment. *Carpenter v. Bryson*, 35 Ga. App. 622, 134 S. E. 180.

§ 5282. (§ 4720). Claimants may dissolve garnishment.

Cited in Tarver v. Jones, 34 Ga. App. 716, 131 S. E. 102; *Johnson v. Planters Bank*, 34 Ga. App. 241, 129 S. E. 125.

§ 5290. (§ 4724). Money raised by garnishment how distributed.

As between two judgments the older and superior one has the prior lien. This is true even as to a lien on a fund brought into court by a garnishment sued out in the case out of which the junior judgment issued. This rule is not changed by section 5273 of the Civil Code of 1910, codifying an act approved November 11, 1901. The decision in the case of *General Motors v. Bank of Valdosta*, 31 Ga. App. 475, 120 S. E. 794, is hereby overruled. *Herndon v. Braddy*, 39 Ga. App. 165, 146 S. E. 495.

CHAPTER 12

Of the Illegality of Executions

§ 5306. (§ 4737). No illegality until after levy.

Applied in Carter v. Alma State Bank, 34 Ga. App. 766, 131 S. E. 184.

§ 5307. (§ 4387). Illegality, how returned and tried.

Applied in Mobley v. Goodwyn, 39 Ga. App. 64, 68, 146 S. E. 28.

§ 5308. (§ 4739). Damages for delay only.

Damages Assessed When Portion of Affidavit Dismissed.—Where a portion of an affidavit of illegality has been dismissed on demurrer for insufficiency, and the remainder is admitted to be incorrect, the jury may be authorized to infer from this that it was filed for delay only, and a verdict assessing damages in favor of the plaintiff in execution, at less than 25% of the principal debt, will not be disturbed, where there is any evidence to support it, unless for some material error of law. *Felker v. Still*, 35 Ga. App. 236, 133 S. E. 519.

§ 5311. (§ 4742). When illegality can not go behind judgment.

The affidavit of illegality in the instant case being based solely upon the ground that one of the jurors rendering the verdict upon which the judgment attacked is based was disqualified by reason of interest, and it not being alleged that the defendant had not been served, or that he had not had "his day in court," it was not error to dismiss the affidavit of illegality, on demurrer. *Owen v. Federal Land Bank*, 37 Ga. App. 394, 140 S. E. 425.

To deny that a judgment ought to have been rendered on account of pre-existing facts, is to go behind the judgment. *Tuff v. Loh*, 38 Ga. App. 526, 144 S. E. 670.

Pursuant to this section it is held that a levy under an execution can not be arrested by a statutory affidavit of illegality which seeks to set up that the judgment on which the execution was issued was obtained during the absence of the defendant, and while absent by permission of the court. That the present proceeding is not one in equity has been determined by the Supreme Court in transferring the case from that court to this court. *Flanigan v. Hutchins*, 39 Ga. App. 220, 146 S. E. 500.

CHAPTER 13

Lost Papers, Where, When, and How Established

§ 5312. (§ 4743). Office papers may be established instanter.

Upon the loss of any office paper in the superior court, a copy may be established instanter, on motion. A written sentence in a criminal case in the superior court does not cease to be an office paper or record because it has not been recorded in the record book of writs in the office of the clerk of the superior court. *Teasley v. Nelson*, 164 Ga. 242, 138 S. E. 72.

CHAPTER 14

Nuisances and Their Abatement

§ 5329. (§ 4760) May be removed, and how.

Necessity of Actual Existence of Nuisance.—This and the following sections were not intended to afford a remedy against that which is not an actually existing nuisance, as distinguished from that which may or probably will become such. The language of this section seems to admit of no other construction. *Fairview Cemetery Co. v. Wood*, 36 Ga. App. 709, 719, 138 S. E. 88.

Effect of Supersedeas.—The plaintiffs had obtained, in a proceeding brought under this section, a judgment declaring a cemetery a nuisance, and a very drastic order abating the same. The defendants applied for and obtained a certiorari to review this judgment, and thus obtained a supersedeas of the judgment. The effect of the supersedeas is to prevent the enforcement of this judgment in toto. So it prevents the enforcement of that portion of the judgment which enjoins the defendants from making additional burials in the cemetery. The effect of a supersedeas can not be enjoined or destroyed by injunction. *Fairview Cemetery Co. v. Wood*, 164 Ga. 85, 88, 137 S. E. 761.

§ 5331. (§ 4762). Nuisances in cities, how abated.

Cited in City Council v. Saunders, 164 Ga. 235, 138 S. E. 234.

§ 5335. "Blind Tiger" a nuisance.

See notes to § 5331.

§ 5337(2). House of prostitution; house and contents a nuisance.

Amendment Showing Abatement Pending Suit.—It was error to refuse to allow a verified amendment to the defendant's answer to a petition to enjoin him from conducting a nuisance in violation of this statute; the allegations of the amendment showing that the nuisance had been absolutely discontinued a few days after the beginning of the proceeding for injunction, and several weeks before the trial, and that all issues in the proceeding had become moot. (Two JJ. dissent.) *Yancey v. State*, 161 Ga. 138, 129 S. E. 642.

§ 5340(a). Park's Cole.

See § 5337(2).

CHAPTER 15

Officers of Court, Rules Against

§ 5343. (§ 4771). Money collected by officers may be demanded, etc.

Necessity for Demand.—In *Battle v. Ricks Lumber Co.*, 38 Ga. App. 621, 144 S. E. 919, it was held that even if this

section and section 5350 were applicable a judgment entered against the defendant sheriff, in so far as it adjudged him due to the plaintiff 20 per cent. interest, is contrary to law, since it does not appear that any demand had ever been made upon the sheriff for the money claimed and for which judgment against him was entered.

§ 5346. (§ 4774). Rules nisi against officers.

Cited in *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 297, 130 S. E. 580.

§ 5347. (§ 4775). Answer to rule nisi, and subsequent proceedings.

Traverse of Answer.—Traverse of answer to remedial proceeding for contempt is not necessary, and the court can hear, without such traverse, the evidence to determine whether the defendant has or has not violated the order of the court. *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 297, 130 S. E. 580.

§ 5350. (§ 4778). Lien of rule absolute.

See notes to § 5343.

CHAPTER 16

Of Partition

ARTICLE 1

General Principles

§ 5355. (§ 4783). Partition.

Necessity of Peculiar Circumstances.—Where no peculiar circumstances are shown, equity will not take cognizance of a partition suit. *Safford v. Anderson*, 162 Ga. 408, 134 S. E. 81.

ARTICLE 2

Partition of Land

SECTION 1

Where, How and by Whom the Application for Partition Must Be Made.

§ 5358. (§ 4786). Proceedings to partition.

Executors can join with the surviving cotenant for the partition of land owned jointly by their testatrix and such surviving cotenant, where the testatrix makes devises of such land, and where the partition of such land between the estate and the surviving cotenant is necessary for its due administration by the executors. *Peck v. Watson*, 165 Ga. 853, 142 S. E. 450.

CHAPTER 17

Possessory Warrant and Proceedings Thereon

ARTICLE 1

By Whom and upon What Ground Possessory Warrant May Issue

§ 5371. (§ 4799). Possessory warrant, by whom and on what ground issued.

See notes to § 3705.

Personal property which has recently disappeared from the "quiet, peaceable, and legally acquired possession" of the owner without his consent may, under this section be recovered by him, by possessory warrant, from a person in possession of it who claims it as a bona fide purchaser from a stranger. The possessor under such circumstances holds it "without lawful warrant or authority," and has no right to the possession as against the owner. *Hogan v. O'Dell*, 39 Ga. App. 43, 146 S. E. 43.

CHAPTER 18

Trespassers on Land and Tenants Holding Over

ARTICLE 1

Proceedings Against Intruders on Land and Tenants Holding Over

SECTION 1

Proceedings Against Intruders

§ 5380. (§ 4808). Intruders, how ejected.

Bona Fide Claim to Possession Good Defense.—That the alleged intruder claims the legal right to possession of the land in good faith is a legal defense against eviction under such process. *Hill v. Security Loan, etc., Co.*, 35 Ga. App. 93, 132 S. E. 107.

Necessity of Process and Return.—Under this section, no process or return of service is required. *Hill v. Security Loan, etc., Co.*, 35 Ga. App. 93, 132 S. E. 107.

§ 5382. (§ 4810). Return of affidavit and trial.

Trial at What Term.—The proceeding under section 5380 being strictly summary and there being no provision as to when an issue formed upon a counter-affidavit to such a proceeding under this section may be tried, the trial of such an issue may be held at the term of court during which the counter-affidavit is filed. *Hill v. Security Loan, etc., Co.*, 35 Ga. App. 93, 132 S. E. 107.

SECTION 2

Proceedings Against Tenants Holding Over

§ 5389. (§ 4817). Double rent and writ of possession, when.

Demand for Rent.—It is not essential that the plaintiff

should prove a demand for payment of the rent prior to the institution of the proceeding. *Moore v. Collins*, 36 Ga. App. 701, 138 S. E. 81, and cases cited.

Time from Which Rent Runs.—Where the tenant files a counter-affidavit and bond, he may be charged with double rent, or double the rental value of the property, as the case may be (see *Stanley v. Stembridge*, 140 Ga. 750, 79 S. E. 842), from the date of the demand for the premises, or, if such date is not shown, from the date of the issuance of the dispossessory warrant, provided the plaintiff is entitled to prevail in such case. *Moore v. Collins*, 36 Ga. App. 701, 138 S. E. 81, and cases cited.

Effect of Receivership of the Property upon Payment of Double Rent.—Whether or not double rent is uncollectible for a period during which the rented premises are in possession of a receiver, the pendency of the receivership will prevent the collection of double rent only when the control and possession of the property by the receiver prevented the tenant from moving out and surrendering the rented premises to the landlord. *Graf v. Shiver*, 36 Ga. App. 532, 137 S. E. 283.

§ 5391. (§ 4819). Property, how replevied.

Since the replevy bond for the eventual condemnation money given by the tenant after the levy of a distress warrant, as provided in this section, takes the place of the lien which is not nullified or discharged by the tenant's bankruptcy, the surety is liable on the replevy bond notwithstanding the tenant's liability for the debt is discharged by the tenant's bankruptcy. *White v. Idelson*, 38 Ga. App. 612, 144 S. E. 802.

§ 5391(a). Park's Code.

See § 5391(1).

§ 5391(1). Bond for delivery.

This section does not render a judgment in favor of the landlord on the replevy bond superior in rank to judgments in favor of other persons, obtained at the same term of court. *Kirsch v. Witt*, 37 Ga. App. 402, 140 S. E. 511.

Where both of such bonds were given in a distress warrant proceeding, and where merely by agreement of the parties in that case the landlord obtained judgment against the surety for the amount of his claim, with a stipulation in the judgment that the sum was "to be made first out of the goods levied upon in this case, and second out of the defendants and their surety," there was no election to proceed against the property on the forthcoming bond as provided in this section. *Kirsch v. Witt*, 37 Ga. App. 402, 140 S. E. 511.

THIRD TITLE

Extraordinary and Equitable Remedies and Pleadings

CHAPTER 1

Joinder of Legal and Equitable Causes

§ 5406. (§ 4833). Equitable or legal rights, remedies applied.

See notes to § 5055.

I. HISTORY, PURPOSE, EFFECT AND CONSTRUCTION.

Construed with Section 5407.—Referring to this section and to section 5407, the Supreme Court in *Douglas v. Jenkins*, 146 Ga. 344, (91 S. E. 50, Ann. Cas. 1918C, 322), said: "These acts have been construed with the utmost liberality, to the end that all the remedies and relief to which the respective parties in any civil cause might be entitled

should be applied and accorded in one action." *Durdens v. Youmans*, 37 Ga. App. 182, 186, 139 S. E. 91.

The purpose of this act was to afford a party the opportunity to have all his rights in regard to the subject-matter tried in one action in the superior court. *Delaney v. Sheehan*, 138 Ga. 510, 513, 75 S. E. 632; *Penn Mutual Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 513, 144 S. E. 400.

This section does not purport to create rights otherwise unauthorized or prohibited. *Penn. Mutual Life Ins. Co. v. Taggart*, 38 Ga. App. 509, 513, 144 S. E. 400.

III. OPERATION UPON SUBJECT MATTER.

Petition Not Demurrable on Certain Grounds.—Since the passage of this section a petition which sets forth a legal cause of action, though using terms appropriate to an equitable proceeding, is not demurrable on the grounds (a) that it sets forth no cause of action (b) that there is no equity in the petition, and (c) that the plaintiff has an adequate remedy at law. *Smith v. Hancock*, 165 Ga. 222, 136 S. E. 52.

Attacking Assignment of Partnership Assets.—In a garnishment proceeding pending in the superior court, wherein a creditor seeks to subject to the process of garnishment the alleged assets of his debtor in a partnership, the creditor, as the plaintiff, may, under the authority of §§ 5406-5413, by an equitable amendment filed in aid of the suit, attack as void against creditors the transfer or assignment of the partnership assets made by the debtor during the pendency of the garnishment proceedings, and may by such amendment add as parties defendant the present defendant debtor as seller and transferor of his partnership assets, and his transferee and subsequent transferees including the transferee or transferees in whom the title thereto is at present apparently vested. *Ocilla Grocery Co. v. Wilcox, Ives & Co.*, 37 Ga. App. 718, 141 S. E. 822.

§ 5407. (§ 4834). Equitable relief from the court.

Amendment seeking equitable relief in common law suit allowed. *Moon v. First Nat. Bank*, 163 Ga. 489, 136 S. E. 433.

§ 5411. (§ 4838). New parties and extraordinary remedies for defendant.

Amendment of Bill of Exceptions Filed by New Party, Allowed.—*McMillian v. Spencer*, 162 Ga. 659, 134 S. E. 921.

Maker's Rights in Action upon the Note by Transferee.—In an action upon a note by the transferee thereof against the maker, the latter can set up his defenses against the payee, and also can make the payee a party to the suit. *McMillan v. Spencer*, 162 Ga. 659, 134 S. E. 921.

CHAPTER 2

Parties in Equitable Proceedings

§ 5415. (§ 4841). Who may sue.

A disallowance of interventions by non-resident creditors, after the time limit in order for filing and proof of claims, in creditors' bill and receivership against bankrupt, was error. *Columbus Iron Works v. Sibley*, 164 Ga. 121, 122, 137 S. E. 757.

§ 5417. (§ 4844). Parties.

Judgment Creditor as Party Defendant.—In *Swift & Co. v. First Nat. Bank*, 161 Ga. 543, 549, 132 S. E. 99, it was held that the judgment creditor was properly joined as defendant, in a suit for injunction by mortgagee to prevent the sale of the property under levy.

Person Interested.—Whoever has an interest in the decree sought should be made a party, if it is practicable. *Waters v. Waters*, 167 Ga. 389, 390, 145 S. E. 460.

§ 5419. (§ 4846). Multiplicity ground for consolidation, when.

Instances of Common Rights.—In the two equitable actions that were consolidated the defendants were the same. In both actions the petitioners, having separate claims based on similar grounds of complaint and a common in-

terest in attacking an alleged conspiracy upon the part of the defendants to defraud creditors supplying material that went into the improvement of real estate, sued in behalf of themselves and other persons similarly situated. In the circumstances it was not error to allow a consolidation of the case, although the parties plaintiff in the original petition were not identical. *Turner v. Security Plumbing Co.*, 165 Ga. 652, 141 S. E. 651.

Where the plaintiff is seeking to hold all the defendants liable in an amount sufficient to make good the capital stock of the corporation, with interest, and each of the defendants has an interest in the matter common to all of them, which is connected with all other matters involved in the suit, the petition is not multifarious. *Crandall v. Shepard*, 166 Ga. 396, 143 S. E. 587.

Pursuant to this section and section 3216, it is held that one suit may be brought to recover on the debt and to set aside fraudulent conveyances, joining debtor and grantees. *Hines v. Wilson*, 164 Ga. 888, 139 S. E. 802.

The cross-petition was maintainable under the provisions and under § 5419, relating to multiplicity of suits as a ground for consolidation and under § 5469, par. 2, relating to bill of peace and multiplicity of suits. *Jones v. Nisbet*, 165 Ga. 826, 142 S. E. 164.

CHAPTER 3

Trial and Its Incidents

§ 5423. (§ 4850). Special verdicts and costs.

Costs in chancery do not always follow the event of the suit, but are awarded according to the justice of the cause. They rest in the sound discretion of the court, to be exercised upon full view of the merits and circumstances of the case. *Peninsular Naval Stores Co. v. Culbreth*, 162 Ga. 474, 134 S. E. 608.

(a) In an equity case it is the province of the judge to determine upon whom the costs shall fall. (b) Auditor's fees may, in the discretion of the court, be apportioned between the parties. (c) The stenographer's fee for reporting the evidence in a case shall be paid upon such terms as the parties may agree upon; and if no agreement is entered into as to the payment thereof, then in such manner as may be prescribed by the presiding judge. *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Applied in *Grizzard v. Ford*, 167 Ga. 531, 146 S. E. 126.

CHAPTER 4

Decrees

§ 5426. (§ 4853). Decrees and remedies.

Applied in *Watters v. Southern Brighton Mills*, 168 Ga. 15, 30, 147 S. E. 87.

Cited in *Swift & Co. v. First Nat. Bank*, 161 Ga. 543, 550, 132 S. E. 99; *Gore v. Humphries*, 163 Ga. 106, 114, 135 S. E. 481.

§ 5429. (§ 4856). Confirmation of sale under decree.

Applied.—*Wingfield v. Bennett*, 36 Ga. App. 27, 134 S. E. 840.

§ 5434. (§ 4861). Dormant decrees, revival.

In *Fischer v. Fischer*, 164 Ga. 81, 84, 137 S. E. 821, it is said: "We do not think that the decree in this case awarding as alimony for the benefit of Mrs. Fischer and her minor child a sum payable in installments is such a decree for money as is contemplated in section 5434 of the Civil Code, providing for the dormancy of decrees."

Although the proceedings in this case were instituted thirteen years after the judgment and decree for alimony sought to be enforced, the demand of the plaintiff was not barred by the statute of limitations, nor on the ground of the dormancy of such judgment. *Fischer v. Fischer*, 164 Ga. 81, 137 S. E. 821.

CHAPTER 5

Proceedings at Chambers

§ 5438. (§ 4865). Notice, when necessary.

Cited in *Crandall v. Shepard*, 166 Ga. 396, 143 S. E. 587.

CHAPTER 6

Of Extraordinary Remedies

ARTICLE 1

Mandamus, Quo Warranto, and Prohibition

§ 5440. (§ 4867). Mandamus to enforce official duties.

Applied in *Bashlor v. Bacon*, 168 Ga. 370, 372, 147 S. E. 762.

§ 5441. (§ 4868). Lies not as private remedy.

Applies to Lawful Offices.—Public office, within the meaning of this section, means an office which has been lawfully created. Such an office must be created by the constitution, by some statute, or by municipal ordinance passed in pursuance of legislative authority. *Benson v. Hines*, 166 Ga. 781, 144 S. E. 287.

Discretionary Acts.—While mandamus is an appropriate remedy to enforce the performance by a public officer of any public duty which he neglects or refuses to perform, it is not available to compel the performance of an act which such an officer is not by law required to perform, but, to the contrary, is clothed with discretionary power which he may exercise in accordance with the best interests of the trust which he is authorized to administer. *Douglas v. Board of Education*, 164 Ga. 271, 138 S. E. 226.

To enforce performance of a ministerial act as contradistinguished from a duty which is merely discretionary, the obligation must be both peremptory and plainly defined; the law must not only authorize the act, but it must require the act to be done. *Douglas v. Board of Education*, 164 Ga. 271, 138 S. E. 226.

Cited in dissenting opinion in *Manry v. Gleaton*, 164 Ga. 402, 474, 138 S. E. 777.

§ 5443. (§ 4870). When not granted.

Proper Remedy Should Be Resorted to in Lieu of Mandamus.—Where it appears that the applicant had a remedy for any error of the ordinary, he can not neglect the remedy and afterwards resort to mandamus proceedings. *Sharp v. McAlpin*, 162 Ga. 159, 161, 132 S. E. 891.

§ 5445. (§ 4872). Facts in issue, how and when tried.

Applied.—*Browne v. Benson*, 163 Ga. 707, 137 S. E. 626.

§ 5451. (§ 4878.) Quo warrants.

Effect of Quo Warranto.—Injunctive order granted to opposing party is not a bar to quo warranto to try title to office in club. *Hornady v. Goodman*, 167 Ga. 555, 568, 146 S. E. 173.

§ 5458. (§ 4885.) Prohibition.

Cited in dissenting opinion in *Byrd v. City of Alma*, 166 Ga. 510, 143 S. E. 767.

ARTICLE 2

Ne Exeat and Quia Timet

§ 5465. (§ 4892). Proceeding quia timet.

Applied in *Felder v. Paulk*, 165 Ga. 135, 139 S. E. 873.

ARTICLE 3

Bills of Peace and Interpleader

§ 5469. (§ 4894). Bill of peace.

See notes to § 5419.

§ 5471. (§ 4896). Interpleader.

Applied in *Fourth Nat. Bank v. Lattimore*, 168 Ga. 547, 550, 148 S. E. 396.

ARTICLE 4

Receivers

§ 5475. (§ 4900). Receiver, when an officer of the court.

This section had its origin as far back as 1855, and has been so frequently construed by this court that citation of authority is not necessary to support the proposition that where the rights of either party would be endangered for the lack of a receiver, the discretion of the court in the appointment of a receiver will not be disturbed unless there is a manifest abuse of discretion. *Mitchell v. Lagrange Banking & Trust Co.*, 166 Ga. 675, 677, 144 S. E. 267.

Enforcement of Delivery of Property to Receiver.—A judge may, in vacation, enforce the delivery of fund or property to the receiver, by attaching and imprisoning any party refusing obedience to his order. *Coker v. Norman*, 162 Ga. 351, 133 S. E. 740.

Applied in *Crockett v. Tripp*, 167 Ga. 322, 324, 145 S. E. 507.

Cited in *Dixon v. Tucker*, 167 Ga. 783, 784, 146 S. E. 736.

§ 5477. (§ 4902). Power of appointment to be cautiously exercised.

Receiver in Divorce and Alimony Case.—In a suit for divorce and alimony, under the circumstances of the case, the prayer for appointment of receiver of the husband's property was denied in view of this section. *Reeve v. Reeve*, 163 Ga. 95, 135 S. E. 434.

General Creditor May Not Enjoin Debtor.—In view of this section and section 5495 creditors without lien cannot, as a general rule, enjoin their debtors from disposing of property, or obtain injunction or other extraordinary relief in equity. *Dixie Metal Products Co. v. Jones*, 163 Ga. 70, 135 S. E. 406.

Applied in *Continental Trust Co. v. Sabine Basket Co.*, 165 Ga. 591, 594, 141 S. E. 664.

Cited in *Dixon v. Tucker*, 167 Ga. 783, 784, 146 S. E. 736.

§ 5478. (§ 4903). Intervention in equitable proceedings.

Cited in *Blumenfeld v. Citizens Bank, etc., Co.*, 168 Ga. 327, 334, 147 S. E. 581.

§ 5479. (§ 4904). Receivers, when appointed.

Appointment without Hearing.—The grant of a temporary injunction and the appointment of a receiver, without a hearing and without sufficient grounds is erroneous. *Board v. Municipal Securities Corp.*, 161 Ga. 634, 131 S. E. 495.

Applied in *Continental Trust Co. v. Sabine Basket Co.*, 165 Ga. 591, 594, 141 S. E. 664.

§ 5488. Counsel fees, how regulated.

Where in a decree on exceptions to an auditor's report the court taxed auditor's and receiver's fees and costs, half to be paid by plaintiff and half by defendants, and plaintiff excepted to so much of the decree as taxed him with any part of such fees and costs, the writ of error is not subject to dismissal on the ground that the plaintiff failed to assign error generally on the decree or on any definite part of it. *Turner v. Shupin*, 166 Ga. 806, 144 S. E. 274.

CHAPTER 7

Injunctions

ARTICLE 1

When Granted

§ 5491. (§ 4914). Administration of criminal laws, no interference by equity.

Proceedings under Ordinances.—Notwithstanding this section where an ordinance illegal and unreasonable in itself is being enforced by prosecution which would deprive a man of his property, or destroy the carrying on of his lawful business, a court of equity will interfere, specially where the authorities are giving to it an interpretation not authorized by its language. *Lilburn v. Alford Bros.*, 163 Ga. 282, 284, 136 S. E. 65.

Cited in *City of Macon v. Samples*, 167 Ga. 150, 157, 145 S. E. 57.

§ 5492. (§ 4915). Enjoining a court of law.

Good Legal Defense.—Petitioners have an adequate remedy at law. All legal or equitable defenses alleged in the petition for injunction may be pleaded in the bail-trover case in the municipal court. *Skinner v. Stewart Plumbing Co.*, 166 Ga. 800, 144 S. E. 261.

Applied in *Roberson v. Roberson*, 165 Ga. 447, 141 S. E. 306.

§ 5494. (§ 4917.) Waste not enjoined when title in dispute.

Applied in *Griner v. Culpepper*, 164 Ga. 858, 139 S. E. 666.

§ 5495. (§ 4918). Creditors without liens.

Cross Reference.—See annotations to § 5477.

A creditor having a justice's court judgment from which an appeal has been taken, and who is otherwise entitled to injunctive relief, does not come within the provisions of this section. *Haygood v. King*, 161 Ga. 732, 132 S. E. 62.

Section Not Applicable.—This was an equitable action by creditors as lienholders by virtue of a judgment of the superior court reviving a dormant judgment. Such lien dates from the date of the judgment of revival. This being so, the case predicated on the judgment reviving the dormant judgment does not fall within the general rule as stated in this section. *Carter v. Martin*, 165 Ga. 890, 142 S. E. 277.

Applied in *Continental Trust Co. v. Sabine Basket Co.*, 165 Ga. 591, 594, 141 S. E. 664.

§ 5499. (§ 4922). Injunction can not compel.

Mandatory Injunction.—An injunction dispossessing one party and admitting another to possession is equivalent to a mandatory injunction, which is not within the proper scope of injunction. Injunction is not available for the purpose of accomplishing an eviction, or to prevent interference with realty by one already in possession. *Beck v. Kah*, 163 Ga. 365, 136 S. E. 160; *Burns v. Hale*, 162 Ga. 336, 133 S. E. 857.

Order restraining obstruction of flow of water, not mandatory, though lowering of dam incidentally required. *Peebles v. Perkins*, 165 Ga. 159, 160, 140 S. E. 360.

§ 5500. (§ 4923). Perpetual injunction.

On the hearing of an application for temporary injunction the judge should not grant a permanent one, but only one of an ad interim character, to remain of force until the final trial. *Pig'n Whistle Sandwich Shops v. Keith*, 167 Ga. 735, 146 S. E. 455.

ARTICLE 2

Procedure in Injunction Cases

§ 5501. (§ 4924). Injunctions, in what manner granted.

As to temporary injunction without hearing, see annotations to sec. 5479.

§ 5502. (§ 4925). The hearing, writ of error, judge's order.

Application to Interlocutory Injunction.—A bill of exceptions will lie to the grant of an interlocutory injunction under this section, and there is no merit in the motion to dismiss the bill of exceptions on the ground that it "does not except to any judgment or ruling upon any issue that is final in the case." *Brindle v. Goswick*, 162 Ga. 432, 134 S. E. 83.

Extent to Which Supersedeas Operates.—One method of obtaining a supersedeas is that provided in this section. This method is applicable in cases in which injunctions are granted or dissolved. In such a case either party may sue out a writ of error to the Supreme Court from a decision against him, upon complying with the law applicable to the same; but no such writ of error shall have the effect to establish or deny any injunction independently of the order of the judge. *Tift v. Atlantic Coast Line R. Co.*, 161 Ga. 432, 447, 131 S. E. 46.

The rule applies where the exception is to the grant of a temporary injunction, and the correctness of the decision depends solely upon a question of law. The judge did not abuse his discretion in refusing a supersedeas in this case. *Peebles v. Perkins*, 165 Ga. 159, 140 S. E. 360.

Applied in *Flanigan v. Hutchins*, 39 Ga. App. 220, 146 S. E. 500.

§ 5504. (§ 4927). In application to enjoin cutting timber.

Cited in *Chapple v. Hight*, 161 Ga. 629, 632, 131 S. E. 505.

FOURTH TITLE

Of Actions

CHAPTER 1

General Principles

§ 5513. (§ 4936). Implied obligations to pay.

Advancement or Loan.—Where the person making an advancement to a husband is a brother of the dead wife, the advancement, if made voluntarily by him and without a request from the husband, is inferably a gift, and there does not arise as a matter of law any implied promise on the part of the husband to repay the money thus advanced. But where the advancement is made at the request of the husband, either express or implied, although there is no express promise to repay, an implied promise by the husband to repay is inferable. *Lovett v. Allen*, 34 Ga. App. 385, 129 S. E. 897.

Applied in *Upchurch v. Maynard*, 39 Ga. App. 332, 134, 147 S. E. 139.

§ 5514 (§ 4937). Joinder of legal and equitable actions.

Editor's Note and General Consideration. — *Jackson v. Mathis*, 35 Ga. App. 178, 132 S. E. 410, following the state-

ment in the Code of 1926 taken from *Lacher v. Manley*, 139 Ga. 80, 78 S. E. 188.

§ 5516. (§ 4939). Parties to actions on contracts.

See annotation to secs. 4460 and 5689.

Exceptions to Section.—To this general rule there are exceptions. Where the purchaser of the assets of a firm agree to pay their debts, a creditor of the firm can by bill, to which the partners and purchasers are parties, enforce this agreement for his benefit. *Bell v. McGrady*, 32 Ga. 257. So where a married woman, having separate property, and being indebted to another by note, conveyed her separate estate absolutely to others in consideration of their agreement to pay her an annuity for life and all debts against her separate property, the agreement may in equity be enforced by her creditors. *Reid v. Whienant*, 161 Ga. 503, 507, 131 S. E. 904.

S's claim against M. T. on five notes and his claim against M. T. and A. on two notes were not "distinct and separate claims" within the meaning of this section. *Atkinson v. Shaw*, 37 Ga. App. 32, 138 S. E. 592.

As an exception to this section where a contract is made for the benefit of a third person as well as for the benefit of the parties thereto, and where one of the parties to the contract obtains money or other property which rightfully belongs to such third person, he may sue thereon in his own name for such money or property, as the law creates both the privity and the promise. *Manget v. National City Bank*, 168 Ga. 876, 149 S. E. 213.

Action on Promissory Note.—An action can not be maintained upon a promissory note payable to the order of a named person, which has not been indorsed or otherwise transferred, except in the name of the person to whom it is payable. *Kohn v. Colonial Hill Co.*, 38 Ga. App. 286, 144 S. E. 33.

Where two persons separately owning various articles of personalty sell them jointly for a lump sum, the sellers jointly own the debt against the buyer for the purchase-money and may bring a joint suit against him for its recovery. *Mathis v. Shaw*, 38 Ga. App. 783, 145 S. E. 465.

Ownership.—The assignee of a mortgage may enforce it against the purchaser of the property who assumes payment. *Reid v. Whisenant*, 161 Ga. 503, 507, 131 S. E. 904.

Applied in action on an insurance policy in *Staten v. General Exchange Ins. Corp.*, 38 Ga. App. 415, 144 S. E. 53.

Cited in *Young v. Certainteed Prod. Corp.*, 35 Ga. App. 419, 133 S. E. 279.

§ 5517. (§ 4940). Parties to actions for torts.

Applied in *Webb v. Carpenter*, 168 Ga. 398, 148 S. E. 80.

§ 5520. (§ 4943). Consolidation of cases.

Creditor Suits against Administratrix.—Where after several suits are separately filed by judgment creditors of the estate of a decedent against the administratrix and the sureties on her bond, a receiver is appointed, under another proceeding, to take charge of the estate, and where, after his appointment the court, by consent of parties, passes an order consolidating all the cases pending against the administratrix and the sureties on her bond, directing that they shall all proceed in the name of the receiver as plaintiff, there is but one case for trial. *Ellis v. Geer*, 36 Ga. App. 519, 137 S. E. 290.

Conspiracy of Contractors and Owners.—No error in consolidating cases of alleged conspiracy of contractor and owners to defeat materialmen, etc. *Turner v. Security Plumbing Co.*, 165 Ga. 652, 141 S. E. 651.

Separate Claims for Cutting Timber.—Plaintiffs held to have right to consolidate separate suits for damages from timber-cutting. *Bainbridge Farm Co. v. Ball*, 165 Ga. 582, 587, 141 S. E. 647.

Cited in *Don v. Don*, 162 Ga. 240, 243, 133 S. E. 242.

§ 5521. (§ 4944). Different claims may be joined.

This statute is merely permissive, for had the legislature determined to make the joinder obligatory, the word "shall," instead of "may," would doubtless have been used. *Endsley v. Georgia Ry. & Power Co.*, 37 Ga. App. 439, 441, 140 S. E. 386.

Actions Which May Be Joined.—A count against a former employer refusing to return an account book to the plain-

tiff, is one in tort, and hence properly joined with a count for conversion of the book, under this section. *Richards v. International Agri. Corp.*, 10 Fed. (2d), 218.

Exception to Section.—The exception to this rule is where equitable principles are involved, such as insolvency or non-residence of the plaintiff. In such cases, where the court has equitable jurisdiction, the general rule does not obtain, and it is permissible to set up a defense founded either in tort or on contract in response to a suit of either nature. But where the court has not equitable jurisdiction, and the suit is filed, for example, in a city court, such a court has jurisdiction of such a dissimilar and equitable plea only when it is purely defensive in its nature, and, if sustained, would result in a verdict finding generally in favor of the defendant. *Porter v. Davey Tree-Expert Co.*, 34 Ga. App. 355, 357, 129 S. E. 557.

Cited in *Hayles v. So. Ry. (Ga.)*, 25 Fed. (2d) 758, 759.

§ 5522. (§ 4945). Concurrent suits.

Applied in *Jones v. Carter Electric Co.*, 164 Ga. 45, 137 S. E. 624; *Allen v. Landers*, 39 Ga. App. 264, 146 S. E. 794; *Nix v. Citizens Bank*, 35 Ga. App. 55, 56, 132 S. E. 242; *Chapple v. Hight*, 161 Ga. 629, 630, 31 S. E. 505.

Cited in *Equitable Life Assur. Soc. v. Pittillo*, 37 Ga. App. 398, 401, 140 S. E. 403.

CHAPTER 2.

Actions, Where and How Brought.

ARTICLE 1

Of the Venue

§ 5527. (§ 4950.) Equitable proceedings, venue.

See notes to § 6540.

A non-resident of the State, suing at law, submits to jurisdiction for equitable relief in same county. *Wachovia Bank v. Jones*, 166 Ga. 747, 748, 144 S. E. 256.

A plaintiff in ejectment can not engraft upon the original petition an amendment in the nature of a petition in equity, praying for a judgment declaring a deed from himself to the defendant, absolute in form, to be a security for debt only, and for an equitable accounting between the parties, etc., without alleging that the defendant is a resident of the county in which the suit is pending or a non-resident of the State. *Hutchings v. Merritt*, 165 Ga. 650, 141 S. E. 652.

Instances Where General Rule of Section Applied.—Suit to recover possession of land and damages for cutting timber, and for equitable relief relating to land and timber. *Brindle v. Goswick*, 162 Ga. 432, 134 S. E. 83.

But an equitable action jointly against the vendee, in an invalid reservation contract, and his transferee, brought in the county of the transferee's residence, to recover as in trover the article sold, and to reform the contract so as to make it include a description of that article, did not lie for lack of jurisdiction. *Flemming v. Drake*, 163 Ga. 872, 137 S. E. 268.

Stated in *Waters v. Waters*, 167 Ga. 389, 145 S. E. 460.

Applied in suit against resident and non-resident defendants, involving land title. *Hines v. Moore*, 168 Ga. 452, 148 S. E. 162.

ARTICLE 3

Suits, How Commenced

SECTION 1

The Petition

§ 5538. (§ 4960). Suits, how commenced.

Description of Premises.—It is essential to the maintenance

of an action for the recovery of land that the premises sued for be described with such certainty as that, in the event of a recovery by the plaintiff, a writ of possession issued upon the judgment, and describing the premises as laid in the petition, shall so identify the premises sued for that the sheriff in the execution of the writ can deliver the possession in accordance with its mandate. *Morton Realty Co. v. Molder*, 164 Ga. 774, 139 S. E. 543.

A demurrer to a petition in an action of complaint for land, which states that "No sufficient description of the real estate sued for is set up in the plaintiff's petition," and that the "petition does not specifically show that the land sued for is any portion of the land set up in paragraph one of the plaintiff's petition," is a special demurrer. *Morton Realty Co. v. Molder*, 164 Ga. 774, 139 S. E. 543.

§ 5539. (§ 4961). Petition to be pragraphed.

Applied in *Fain v. Fain*, 166 Ga. 504, 143 S. E. 586; *Dinsmore v. Holcomb*, 167 Ga. 20, 144 S. E. 780.

Cited in *Pape v. Woolford Realty Co.*, 35 Ga. App. 284, 134 S. E. 174, and *Cochran v. Carter*, 35 Ga. App. 286, 132 S. E. 921.

SECTION 2

Exhibits

§ 5541. (§ 4963). Copies, exhibits, etc.

Editor's Note and General Consideration.—A contract referred to in note need not be set out where the note and not the contract constitutes the cause of action. *Reed v. Colonial Hill Co.*, 34 Ga. App. 48, 128 S. E. 201.

There is full compliance with this section where the petition sets forth, as to each of the notes sued on, the date, amount, maturity, rate of interest, and date from which it runs, and attaches a specimen copy, with the further statement that each of the notes sued on is otherwise identical in form. *Reed v. Colonial Hill Co.*, 34 Ga. App. 48, 49, 128 S. E. 201.

In *Heyward v. Ramsey*, 35 Ga. App. 472, 473, 134 S. E. 119, the court said: "Though the petition alleges that the amount due the plaintiff was for services rendered 'as per contract,' it was not necessary to attach a copy of the contract."

This provision of law was met in this case, and there is no merit in the demurrer on the ground that no copy of the application for insurance and of the answers of the insured to the medical examiner was attached to the petition as exhibits. *Life, etc., Ins. Co. v. Burkett*, 38 Ga. App. 328, 144 S. E. 29.

Where, as in the instant case, a suit is based upon a written and unconditional promise to pay, which merely sets forth that the obligation is secured by a land contract, and where only a personal judgment is sought against the defendant, and no relief is prayed for which must be based upon the security contract referred to, the petition is not subject to demurrer on the ground that the contract referred to is not attached thereto. The note sued on being unconditional in its obligation, any advantage which the defendant might seek to take of any clause which might possibly be contained in the security contract, as construed in connection with the instrument sued on, could be pleaded by the defendant as a matter of defense. *Hazlehurst v. Stahl Florida Properties Co.*, 39 Ga. App. 209, 146 S. E. 510.

The requirement of this section, as to setting out or attaching to the plaintiff's petition copies of contracts, etc., applies only where the instrument constitutes the cause of action or the basis of the relief prayed for. Where a contractor employed to erect a building was sued by a subcontractor on a written contract between them which referred to a contract between the former and the owner of the building, the petition, to which a copy of the contract between the plaintiff and the defendant was attached as an exhibit, was not subject to general demurrer or an oral motion to dismiss the petition on the ground that the contract between the defendant and the owner of the building was not set out or attached as an exhibit. *Krebs Co. v. Godfrey Marble and Tile Co.*, 39 Ga. App. 494, 147 S. E. 399.

Cited in *Metropolitan Life Ins. Co. v. Mapp*, 38 Ga. App. 30, 142 S. E. 564.

SECTION 5

Dismissal of Petitions

§ 5548. (§ 4970). Dismissal of petition.

Exception to Section.—A petition for habeas corpus is an exception to the operation of this section. Hence, a petitioner in a habeas corpus proceeding has no right to deprive the court of jurisdiction, after jurisdiction has once attached, by a voluntary dismissal. *Collard v. McCormick*, 162 Ga. 116, 124, 132 S. E. 757.

Applications.—There is nothing in the answer of the defendant which renders it an answer in the nature of a cross-petition thereby preventing dismissal. *Winter v. People's Bank*, 166 Ga. 385, 391, 143 S. E. 387.

Libellant's dismissal of divorce suit carried out cross-bill of libelee. *Black v. Black*, 165 Ga. 243, 140 S. E. 364.

Time of Dismissal.—Under § 5627, plaintiff may dismiss an action at any time where no set-off is involved. *Hayles v. So. Ry. (Ga.)*, 25 Fed. (2d) 758.

When Dismissal Effective.—When the judge has signed an order of dismissal, the dismissal is immediately effective. *Hayles v. So. Ry. (Ga.)*, 25 Fed. (2d) 758, 759.

Costs.—The question of costs is between the clerk and party liable for such costs, and might be a sufficient reason to induce the judge not to sign the order of dismissal, or to affix a condition that the costs be paid. The opposite party cannot attack the validity of the order of dismissal on this ground. *Hayles v. So. Ry. (Ga.)*, 25 Fed. (2d) 758, 759.

SECTION 6

Certain Forms of Action Preserved

§ 5550. (§ 4972). Special statutory proceedings, etc.

Cited in *Hornady v. Goodman*, 167 Ga. 555, 570, 146 S. E. 173.

ARTICLE 4

Filing, Process, and Service.

§ 5553. (§ 4975). Service on nonresident.

Street Address.—When the street address of a non-resident defendant in a divorce suit, who resides in a city in which the streets are numbered, and in which mail is delivered by carriers, is known to the plaintiff at the time of the institution of the divorce suit, it is the duty of the plaintiff, in making an affidavit for the purpose of obtaining an order to perfect service by publication, to give therein such street address, or otherwise furnish it to the court or its clerk, in order to enable the clerk to properly address the envelope or package containing a copy of the newspaper in which notice requiring the defendant to appear is published. In such a case it is not sufficient to give merely the city and State in which the defendant resides. *Millis v. Millis*, 165 Ga. 233, 140 S. E. 503.

§ 5554. (§ 4976). Service by publication, when.

Applied in *Roberts v. Burnett*, 164 Ga. 64, 137 S. E. 773; *Watters v. Southern Brighton Mills*, 168 Ga. 15, 30, 147 S. E. 87.

§ 5556. (§ 4978). Service by publication.

Creditor's Suit.—While the above section of the Code applies to suits between original parties yet it is the court's opinion that by analogy it had a bearing upon a petition in the nature of a creditor's suit. *Columbus Iron Works v. Sibley*, 164 Ga. 121, 124, 137 S. E. 757.

Construction of Order with Section.—In *Watters v. Southern Brighton Mills*, 168 Ga. 15, 147 S. E. 87, it is

said: "The order of the judge directing service by publication must be construed in connection with the provisions of the statute (this section) under which it was granted, and was not void on the ground that it failed to direct that service be perfected by 'publication twice a month for two months' instead of directing merely 'that service be perfected by publication in the paper in which sheriff's advertisements are published.'"

§ 5557. (§ 4979). Copy of publication to be filed.

Generally.—See *Faughnan v. Bashlor*, 163 Ga. 525, 136 S. E. 545, following the note in the Georgia Code of 1926.

This section, being in derogation of the common law, must be strictly construed in favor of getting notice to the non-resident party. So it is held that a paper containing this notice can not be mailed by any person except the clerk or his deputy. *Millis v. Millis*, 165 Ga. 233, 236, 140 S. E. 503; *Deariso v. Mobley*, 38 Ga. App. 313, 322, 143 S. E. 915.

Any variance in the address as stated in the order for publication and the certificate of the clerk would not render the judgment void, it appearing that the address was unknown. It is only where the address is known that this section required that a copy of the newspaper be mailed to the party. *Watters v. Southern Brighton Mills*, 168 Ga. 15, 147 S. E. 87.

§ 5558. (§ 4980). Judge to determine if service properly perfected.

Order before Trial.—This section does not explicitly require the court to pass such order before the trial. *Millis v. Millis*, 165 Ga. 233, 241, 140 S. E. 503.

Adjudication Not Jurisdictional.—The adjudication by the trial judge that service has been perfected in these ways, though essential and important, is like the return of an officer of service, not jurisdictional. *Millis v. Millis*, 165 Ga. 233, 241, 140 S. E. 503.

§ 5559. (§ 4981). Appearance and pleading cure defects.

The defendant waived process by his general demurrer, the second paragraph of the demurrer being "that no cause of action is set out in said petition." Under this section, the defendant was pleading to the merits in the same breath that he was asserting that there was no process; but it has uniformly been held that the filing of a general demurrer is a waiver of process. *Wilson v. City Council*, 165 Ga. 520, 522, 141 S. E. 412.

An acknowledgment and waiver of service, entered upon the petition by the defendant after his removal from the county in which the suit was filed, would not amount to a waiver of jurisdiction as to the defendant's person. *Bolton v. Keys*, 38 Ga. App. 573, 144 S. E. 406.

Applied in *Harper v. Tennessee Chemical Co.*, 37 Ga. App. 433, 140 S. E. 408.

§ 5562. (§ 4984). When to be filed.

See notes to § 5965.

Applied in *Fain v. Fain*, 166 Ga. 504, 143 S. E. 586.

§ 5563. (§ 4985). Service of process, how made.

See annotations to section 4717.

In *Biggers v. Bank*, 38 Ga. App. 521, 523, 144 S. E. 397, it is said: "As to ordinary suits, this section provides that leaving a copy at the defendant's residence shall be sufficient service. The defendant here could not have been so served. In a case of this sort the question is not one of domicile merely, but is one of actual residence. Residence has been defined to be an act, and where a person voluntarily removes from this State for the purpose of living and carrying on business elsewhere for an unlimited period, he is, for the purposes of attachment, a non-resident of Georgia, notwithstanding he may occasionally visit this State and may intend to return at some indefinite time in the future."

§ 5566. (§ 4988). Entry of sheriff may be traversed.

Pleading—Affidavit of Illegality.—Where an affidavit of

illegality is based upon the ground that the affiant was not served in the suit, and where the affidavit sets forth a return of service by the sheriff and a traverse of such return by the affiant, and it is not alleged in the traverse that the traverse was made at the next term of the court after the affiant had notice of the sheriff's return, the affidavit of illegality is subject to dismissal on demurrer. *Knight v. Jones*, 63 Ga. 481; *Clements v. Haskins*, 35 Ga. App. 484, 134 S. E. 125.

An affidavit of illegality denying service raises no issue where there exists an untraversed return of service, since such an unimpeached return is conclusive upon that question. Although a traverse to a return of service is a proceeding distinct and independent from an affidavit of illegality based upon a lack of service, it is nevertheless permissible to include the former with the latter, provided the traverse be filed at the first term after notice of the return of service, and provided further that the officer entering the return is made a party. *Hamilton v. Chitwood*, 37 Ga. App. 393, 140 S. E. 518.

Applied in *Schermerhorn v. National Fire Ins. Co.*, 38 Ga. App. 470, 144 S. E. 395.

§ 5570. (§ 4992). Service too late, good for next term.

In a suit in a justice's court, service made after the expiration of the term to which the suit is returnable amounts to no service whatever, and is void; and in such a case no judgment can legally be rendered against the defendant where service is not waived. *Collins v. Kennedy*, 39 Ga. App. 205, 146 S. E. 502.

§ 5573. (§ 4995). Special pleading not admitted.

Effect of Section upon Pleading Estoppel.—Under this section it is not necessary for the plaintiff to plead estoppel. Every fact pleaded in an answer as true is treated as denied by the plaintiff, and evidence may be introduced in behalf of the plaintiff to rebut, controvert, or otherwise show that for any reason the defense pleaded is not good against the plaintiff's claim. But in a case where the defendant relies upon estoppel as a defense, it must be pleaded because other sections of this act require that the defense be plainly and clearly presented. *Brown v. Globe, etc., Fire Ins. Co.*, 161 Ga. 849, 854, 133 S. E. 260.

Applied in *City National Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S. E. 795.

ARTICLE 5

In Ejectment

§ 5576. (§ 4998). Mesne profits, no separate suit for.

Cited in *Treadway v. Harris*, 34 Ga. App. 583, 585, 130 S. E. 827.

§ 5579. (§ 5001.) True claimant made defendant.

Defendant Not Bound by Judgment When Not Made a Party.—A judgment in a former suit for land in which the defendant was not a party and was not notified or made a party under this section, is not admissible in evidence against the defendant in a later suit for the land. *Harrison v. Hester*, 163 Ga. 250, 251, 135 S. E. 845.

§ 5582. (§ 5004). Plaintiff recovers on his own title.

Illustration.—The contention that the verdict in favor of the plaintiff is without evidence to support it, and therefore contrary to law, because the plaintiff had not proved title to the lot in dispute, is without merit, as the evidence demanded a finding that the plaintiff had title, and that the defendant had no title thereto. *Walton v. Sikes*, 165 Ga. 422, 141 S. E. 188.

§ 5583. (§ 5005). Judgment conclusive.

Upon application of this section to the facts alleged in

the plaintiff's petition, the defendant's demurrer based upon the ground that the controlling issue in the case was *res adjudicata* should have been sustained, and the court erred in overruling it. *Merritt v. Hutchings*, 158 Ga. 734, 148 S. E. 916.

§ 5585. (§ 5007.) The consent rule.

Actions to Which Limited.—The consent rule set out in this section is applicable only to actions of ejectment brought in the fictitious form. *Horn v. Towson*, 163 Ga. 37, 135 S. E. 487.

§ 5586. (§ 5008). Plaintiff may recover on his prior possession, when.

Prior possession is some evidence of title, and is sufficient as a basis for recovery of possession as against a trespasser. *Terrell v. Gould*, 168 Ga. 607, 148 S. E. 515.

Evidence of prior possession alone is sufficient to put the defendant on proof that he has a better title than that of the plaintiff. *Terrell v. Gould*, 168 Ga. 607, 148 S. E. 515.

§ 5587. Bona fide holder may set off the value of permanent improvements.

"Adverse claim of title," under this section, need not be evidenced by any writing. *Walton v. Sikes*, 165 Ga. 423, 141 S. E. 188.

It was error to refuse a request to charge the jury that under this section "the good faith of the purchaser or the defendant who has possession is not necessarily destroyed by error of judgment or the failure to exercise all possible diligence." *Walton v. Sikes*, 165 Ga. 422, 141 S. E. 188.

The court erred in charging the jury as follows: "One who enters upon land under a conveyance from one not in possession, and, so far as appears, not having any color of title, enters and improves the premises at his peril; the true owner is under no obligation to account to him for taxes paid or for the cost of improvements over and above the mesne profits accruing." The principle announced in *Tripp v. Fausett*, 94 Ga. 330, 21 S. E. 572, is not applicable to a case which comes within this section. *Walton v. Sikes*, 165 Ga. 422, 141 S. E. 188.

CHAPTER '3

Making Parties Pending Action

§ 5598. (§ 5016). Parties made on motion.

Where pending a motion for a new trial, which was subsequently overruled, the movant died, and a woman, by order of the court, was made a party, upon petition showing that she had been appointed administratrix of the estate of the decedent, and upon the overruling of the motion for new trial a bill of exceptions was sued out, assigning error upon that judgment, the writ of error will not be dismissed upon the ground that no notice was given to the opposite party, in compliance with the provisions of this section, but it will be presumed that the court had evidence before it that notice had been given or waived. If as a matter of fact the proper notice had not been given, the respondent in the motion should have moved in time to vacate the judgment making the administratrix a party. *Stanaland v. Horne*, 165 Ga. 685, 142 S. E. 142.

§ 5601. (§ 5019.) Parties made in term or vacation.

Time at Which Rule Returnable.—No time is prescribed at which the rule shall be returnable. That time is left to the discretion of the court. Upon return of the rule the judge can do no more than allow or refuse to allow the respondent to be made a party. *McMillan v. Spencer*, 162 Ga. 659, 663, 134 S. E. 921.

§ 5602. (§ 5020.) Time of trial where parties made.

Applied in *McMillan v. Spencer*, 162 Ga. 659, 663, 134 S. E. 921.

Cited in *Estes v. Callahan*, 164 Ga. 744, 748, 139 S. E. 532.

§ 5616. (§ 5034). Execution against deceased defendants.

Cited in *Pursley v. Manley*, 166 Ga. 809, 812, 144 S. E. 242.

CHAPTER 4

Abatement, Retrait, Dismissal, and Removal of Actions

§ 5623. (§ 5041). Death of one of several defendants.

Death after Reference to Auditor.—Under this section the death of one of the defendant sureties after the filing of a suit against principal and sureties on an administrator's bond, and after a reference of the case to an auditor, but before the hearing by the auditor, does not abate the suit or deprive the auditor of jurisdiction. *Ellis v. Geer*, 36 Ga. App. 519, 137 S. E. 290.

§ 5625. (§ 5043). Differs from dismissal.

As provided in this section, it is essential to the plaintiff's right to a recommencement of his suit, after a dismissal, that the accrued costs in the former suit be paid. *Gheesling v. Louisville, etc., R. Co.*, 38 Ga. App. 485, 486, 144 S. E. 328.

Applied in *Stinson v. Branan*, 166 Ga. 752, 144 S. E. 324.

§ 5626. Renewal of suits in forma pauperis.

See notes to § 4381.

Applied in *Manchester v. Beavers*, 38 Ga. App. 337, 338, 144 S. E. 11.

§ 5627. (§ 5044.) Actions may be dismissed at any time.

See annotations to section 5548.

FIFTH TITLE

Of Defenses and Proceedings Pending Action

CHAPTER 1

Defenses, Pleas, Etc.

ARTICLE 1

General Provisions

§ 5628. (§ 5045.) Sufficiency of petitions and pleas determined at first term.

Effect of Order Allowing Time for Amendment.—An order declaring that the petition would be dismissed unless amended within a given time could not operate as a final judgment of dismissal, and upon the amendment of the petition the merits of the case could be determined. *Smith v. Bugg*, 35 Ga. App. 317, 133 S. E. 49.

Applied in *Hattaway Lumber Co. v. Southern Lumber Corp.*, 39 Ga. App. 741, 148 S. E. 358.

§ 5630. (§ 5047). Modes of defense.

Effect of 1925 Amendment.—While, under the 1925 amendment of this section, the trial judge may hear and determine all demurrers in equity causes in which extraordinary relief is sought, at any interlocutory hear-

ing before the appearance or first term, he is not obliged to do so, but may postpone the hearing of such demurrers until the hearing of the same may be reached in due order. *Byrd v. Piha*, 165 Ga. 397, 141 S. E. 48. For application of the amendment, see *Ward v. Parks*, 166 Ga. 149, 142 S. E. 690; *Cochran v. Knott*, 165 Ga. 109, 139 S. E. 818.

Applied in *Hattaway Lumber Co. v. Southern Lumber Corp.*, 39 Ga. App. 741, 148 S. E. 358; *Manchester v. Beavers*, 38 Ga. App. 337, 338, 144 S. E. 11.

§ 5631. (§ 5048.) Demurrer, grounds of.

See notes to § 5538.

When Proper—Grounds for Special Demurrer.—While multifariousness is a ground of demurrer under this section it is not favored by the courts. *Smith v. Hancock*, 163 Ga. 222, 233, 136 S. E. 52.

Cited in *Griffin Fuel Supply Co. v. Automobile Ins. Co.*, 37 Ga. App. 208, 139 S. E. 367.

§ 5633. (§ 5050.) Demurrer to pleas.

See annotations to sec. 5573.

§ 5634. (§ 5051.) Each paragraph to be separately answered.

Cited in *Southern Crushed Stone, etc., Co. v. Dorn*, 37 Ga. App. 564, 566, 141 S. E. 59.

§ 5638. (§ 5055.) Verified petition requires verified plea.

Authority of Corporate Officer.—Sworn averments as to agency or authority of corporate officer, to make the affidavit, is not required. *Georgia Lumber Co. v. Thompson*, 34 Ga. App. 281, 129 S. E. 303.

§ 5640. (§ 5057.) Verification of amended answer required.

Cited in *Davis v. Starrett Brothers Inc.*, 39 Ga. App. 422, 147 S. E. 530.

§ 5641. (§ 5058.) Dilatory pleas must be sworn to.

A plea to the jurisdiction must be filed at the first term. If not so filed, it will not be considered. *Smith v. Rawson*, 61 Ga. 208. By parity of reasoning, a motion to dismiss, or demurrer to, a petition, upon the ground of lack of jurisdiction of the person of a defendant, must be urged at the appearance term, or it will not be considered. *Roberts v. Burnett*, 164 Ga. 64, 137 S. E. 773.

A plea to the jurisdiction, when no want of jurisdiction appears on the face of the petition, is a dilatory plea; and it will not be considered unless filed at the first term, made in person, and sworn to. *Bilbo v. Bilbo*, 167 Ga. 602, 146 S. E. 446.

Applied in *Hattaway Lumber Co. v. Southern Lumber Corp.*, 39 Ga. App. 741, 148 S. E. 358.

§ 5647. (§ 5063.) Replication and order for trial.

See annotations to section 5573.

§ 5649. (§ 5065.) No part to be stricken out.

Applied in *Home Ins. Co. v. Swann*, 34 Ga. App. 19, 26, 128 S. E. 70.

§ 5650. (§ 5066.) Pleas of non est factum must be sworn to.

See notes to § 4210.

Applied in *Wier v. Armour Fertilizer Works*, 34 Ga. App. 461, 129 S. E. 915.

§ 5651. (§ 5067.) Petition and answer make issue.

See annotations to § 5573.

Applied in *City National Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S. E. 795.

§ 5652. (§ 5068.) Effect of amendment.

Immaterial Amendment.—While the filing of a material amendment to the petition after the case has been entered “in default” will open the default so as to give the defendant full right to plead, the filing of an immaterial amendment, whether before or after the entry of default, will not affect the validity of the judgment rendered, since the judgment cures any defective statement of the original cause of action. *Henderson v. Ellarbee*, 35 Ga. App. 5, 131 S. E. 524.

Effect of Striking Answer.—Under the provisions of this section it was unnecessary to introduce any evidence in the present case, since the court had stricken the answers of the defendants, and they did not offer any other or further defense by way of plea or answer. *Loftis v. Clay*, 164 Ga. 845, 139 S. E. 668.

Applied in *Citizens & Southern Bank v. Seigler*, 167 Ga. 657, 146 S. E. 485; *Land v. Pike’s Peak Lumber Co.*, 35 Ga. App. 159, 132 S. E. 644; *Taylor v. Keown*, 36 Ga. App. 631, 137 S. E. 907.

ARTICLE 2

Judgment by Default

§ 5653. (§ 5069.) Call of appearance-docket.

When Section Applies.—If on the call of the appearance docket at the appearance term a case is called in which the defendant has filed no demurrer, plea, or answer, and the judge marks the case on the docket “in default,” such entry by the judge on the docket is a judgment that the case is in default. But such an entry is not a “judgment by default.” At most it can only be a judgment that the case is “in default” and in no sense is a rendition of a final judgment against the defendant in response to the prayers of the petition. *Love v. National Liberty Ins. Co.*, 157 Ga. 259, 262, 121 S. E. 648; *Fraser v. Neese*, 163 Ga. 843, 137 S. E. 550.

Effect of Agreement Extending Time.—The private stipulation between the parties is not binding on the court, or operative as extending the time provided by statute for filing a defense. *Fraser v. Neese*, 163 Ga. 843, 137 S. E. 550.

Same—Manner of Taking Advantage of Agreement.—Notwithstanding an agreement between the parties for a continuance, the defendant must appear before the court and ask for a continuance as provided by law, or after being marked “in default” must proceed as prescribed to open the default. If he fails to follow such procedure the court is without power to open it at a following term. *Fraser v. Neese*, 163 Ga. 843, 137 S. E. 550.

Power of Clerk to Alter Entry.—If after an entry by the judge at the appearance term the clerk of the court during the same term, without direction or authority from the judge, erases the entry “in default” on the docket by drawing a line through it, such action upon the part of the clerk should be treated as a mere clerical act insufficient in law to modify or alter the default judgment entered by the judge. *Fraser v. Neese*, 163 Ga. 843, 137 S. E. 550.

Irregularity of Second Entry as Affecting First.—The original entry of default made by the judge at the first term is not affected by the fact that an entry is made at a subsequent term by virtue of an ex parte order of the judge even though the second entry might be irregular because the defendant was not given a hearing. *Fraser v. Neese*, 163 Ga. 843, 137 S. E. 550.

Applied in *Harper v. Tennessee Chemical Co.*, 37 Ga. App. 433, 140 S. E. 408.

§ 5654. (§ 5070.) Opening default.

Effect of Failure to Make Proper Showings.—The movant having failed to comply with the provisions of this and the following section by not making the proper showing, it can not be held that the court erred in denying the application, especially as it does not appear that there was an abuse of the discretion which the trial judge exercises over the whole matter. *Henderson v. Ellarbee*, 35 Ga. App. 5, 131 S. E. 524.

Applied in *Fain v. Fain*, 166 Ga. 504, 143 S. E. 586.

§ 5656. (§ 5072.) Opening default at trial term.

Discretion of Court.—See *Strother v. Harper*, 36 Ga. App. 445, 136 S. E. 828, following statement under this catchline in Ga. Code of 1926.

Payment of costs is a mandatory requirement of this section; and if not paid, judgment for the plaintiff may be rendered by the court. *Miller v. Phoenix Mutual Life Ins. Co.*, 168 Ga. 321, 147 S. E. 527.

To What Courts Applicable.—While it has been held that the provisions of this section do not have application to suits in those courts wherein judgment may be taken at the first term, where by the procedure provided for such courts the superior-court practice is impracticable and therefore inapplicable; *Bridges v. Wilmington Savings Bank*, 36 Ga. App. 239, 136 S. E. 281, such rulings should not be given effect where, as here, the act creating the city court does limit the time allowed for the filing of pleas, and specifically provides the method by which a defendant may “open the default” resulting from a failure to plead within the time provided by the act. *Cobb v. Burgamy*, 39 Ga. App. 602, 147 S. E. 921.

Cited in *Riggs v. Kinney*, 37 Ga. App. 307, 140 S. E. 41.

§ 5660. (§ 5076.) Judgment without a jury, when.

Where a suit is brought upon a promissory note and notice is given under § 4252 as a prerequisite to the recovery of such fees, the note is an unconditional contract in so far as it stipulates for the payment of principal and interest, but is a conditional contract in so far as it obligates the maker to pay attorney’s fees. Being conditional in part, the note is not “an unconditional contract in writing,” and even though the suit thereon should be in default, the case is not one in which the court, under section 5660, is authorized to render a judgment in favor of the plaintiff without a jury, as in undefended suits in unconditional contracts in writing. *Fowler v. Bank*, 38 Ga. App. 226, 143 S. E. 512.

§ 5662. (§ 5078.) Verdict in suits in default.

Direction of Verdict.—While the judge may ordinarily have no authority to render judgment without the verdict of a jury, except in cases referred to in this section, and section 6516, this does not mean that, even in those cases where the verdict of a jury is necessary, the court may not direct it where it is demanded by the law and the facts. *Pape v. Woolford Realty Co.*, 35 Ga. App. 284, 134 S. E. 174. This principle was applied with reference to a promissory note and collection of attorney fees in *State Mut. Life Ins. Co. v. Jacobs*, 36 Ga. App. 731, 137 S. E. 905.

Applied in *Flanigan v. Hutchins*, 164 Ga. 313, 138 S. E. 793.

Cited in *Cochran v. Carter*, 35 Ga. App. 286, 132 S. E. 921.

ARTICLE 3

Particular Pleas

SECTION 1

To the Jurisdiction

§ 5664. (§ 5080.) Jurisdiction, when admitted.

Waiver of Jurisdiction of the Person.—If a defendant appear and plead to the merits without pleading to the jurisdiction and without excepting thereto, he thereby admits the jurisdiction of the court. The effect of a voluntary appearance and pleading to the merits is to waive jurisdiction of the person, where the rights of third persons are not thereby prejudiced. This rule applies to equitable cases. *Waters v. Waters*, 167 Ga. 389, 145 S. E. 460.

Motion to Vacate after Verdict Not Waiver of Jurisdiction.—Where a nonresident learning that verdict and judgment had gone against him, first moved to vacate the verdict and judgment, the appearance by such motion after the rendition of the verdict and judgment is not such an appearance as to amount to a waiver of jurisdiction. *Christian v. Terry*, 36 Ga. App. 815, 816, 134 S. E. 244.

Applied in *Hattaway Lumber Co. v. Southern Lumber Corp.*, 39 Ga. App. 741, 148 S. E. 358; *Todd-Worsham Auction Co. v. Underwood*, 38 Ga. App. 792, 145 S. E. 889.

§ 5665. (§ 5081). Plea to the jurisdiction.

Pursuant to this section it was held that where an equitable petition for the partition of land brought in the county where the land is located, against certain cotenants who reside in a different county in this State, and against certain cotenants who reside beyond the limits of this State, the jurisdiction of the court over the cotenants so residing in this State can be raised only by them, either by plea, demurrer, or motion, and can not be urged by a defendant residing in the county in which the suit is instituted. *Roberts v. Burnett*, 164 Ga. 64, 137 S. E. 773.

Applied in *Bilbo v. Bilbo*, 167 Ga. 602, 146 S. E. 446.

§ 5666. (§ 5082.) Contents of the plea.

Allegation as to Lack of Jurisdiction Must Be Substantiated by Facts.—The caveat merely contains the statement that the court which passed the order adopting the children was without jurisdiction over them. The rules of good pleading require the allegation of facts to support this conclusion. The allegation is that they were adopted by a court having no jurisdiction; and if the caveator desired to collaterally attack the adoption for want of jurisdiction in the court which did pass the order, the burden was upon him to allege in a proper plea such facts upon which he relied to deprive the court of jurisdiction. *Harper v. Lindsey*, 162 Ga. 44, 47, 132 S. E. 639.

SECTION 2

Of Set-Off and Usury

§ 5668. (§ 5084). Pleas of set-off.

Applied in *Jefferson Standard Life Insurance Co. v. Rankin*, 39 Ga. App. 373, 147 S. E. 157.

SECTION 4

Non Est Factum, etc.

§ 5676. (§ 5092). Non est factum.

See notes to § 4210.

§ 5678. (§ 5094.) Pleas of former recovery and pendency of former suit.

Connecticut Rule.—It would seem that the codifiers, by this section, intended to adopt the Connecticut rule. *Hood v. Cooledge*, 39 Ga. App. 476, 478, 147 S. E. 426.

Cause Not Identical.—The pendency of an action for damages brought by the plaintiffs against the counties of Telfair and Jeff Davis, for the wrongful taking and appropriation of a right of way over their lands for a public road and for a free public bridge, does not prevent the subsequent proceeding brought by the state highway to condemn their land for the same purposes. *Cook v. State Highway Board*, 162 Ga. 84, 96, 132 S. E. 902.

Applied in *Holston Box, etc., Co. v. Vonberg*, 34 Ga. App. 298, 129 S. E. 562.

CHAPTER 2

Of Amendments

ARTICLE 1

General Principles

§ 5681. (§ 5097.) Amendments of pleadings, when allowed.

II. GENERAL CONSIDERATION.

Setting Out Cause of Action.—This section, properly construed, means, that in order to admit of an amendment, a valid cause of action must be set forth in the original declaration. *Macon v. Newberry*, 35 Ga. App. 252, 132 S. E. 917.

Cited in *City Council of Augusta v. Lamar*, 37 Ga. App. 418, 420, 140 S. E. 763; *Davis v. Starrett Brothers, Inc.*, 339 Ga. App. 422, 147 S. E. 530.

IV. WHAT PLEADINGS AMENDABLE.

Material Evidence Omitted from Exceptions.—Where within the time required by law a party files exceptions to the auditor's report, but neglects to set forth in connection with such exception the evidence necessary to be considered in passing thereon, or to point out the same by proper reference, or to attach it as exhibits to his exceptions, such exceptions can be thereafter amended so as to cure these defects. *Clements v. Fletcher*, 161 Ga. 21, 129 S. E. 846.

§ 5682. (§ 5098.) Enough to amend by.

Amendment Showing Insurable Interest.—A petition in a suit on a fire insurance policy may be amended to show the insurable interest of the plaintiff. *Georgia Farmers Fire Ins. Co. v. Tanner*, 34 Ga. App. 809, 131 S. E. 191.

Applied in *Nashworthy v. Alford*, 38 Ga. App. 286, 143 S. E. 622.

§ 5683. (§ 5099.) New cause of action and parties not allowable.

Editor's Note.—See *Strachan Shipping Co. v. Hazlip-Hood Cotton Co.*, 161 Ga. 480, 483, 131 S. E. 283, quoting from the case referred to under this catchline in the Georgia Code of 1926.

Applicable Both at Law and in Equity.—This principle is applicable both to actions at law or in equity. *Magid v. Byrd*, 164 Ga. 609, 623, 139 S. E. 61.

Instances of Amendments Allowable within Rule.—A new cause is not added where the consignor of goods in an action in tort for damages struck an allegation that the goods were lost and substituted an allegation that they were carried to a place other than the destination, sold and the proceeds paid to another. *Strachan Shipping Co. v. Hazlip-Hood Cotton Co.*, 161 Ga. 480, 131 S. E. 283.

Where an amendment merely corrected a contradiction, but did not change the parties to the suit, the nature of the transaction, or the cause of action; and it was properly allowed. *Burch v. Atlantic Life Ins. Co.*, 37 Ga. App. 53, 66, 139 S. E. 123.

Adding New Parties.—New and distinct parties can not properly be added by amendment in a proceeding to remove obstructions from a private way. *Troup v. Tomberlin*, 34 Ga. App. 623, 130 S. E. 541.

Upon application of an employee, a court of equity could not "reform" or amend a judgment of the superior court so as to make it a judgment against a sole stockholder of the corporation, who continued the business in the name of the corporation, as this would be adding a new party, which can only be done in cases expressly provided by law. *Bishop v. Bussey*, 164 Ga. 642, 139 S. E. 212.

Applied in *Exec. Com. of Baptist Convention v. Smith*, 39 Ga. App. 417, 420, 147 S. E. 418.

§ 5686. (§ 5102). Misnomers amendable in-stanter.

Construed with Section 5681.—While this section provides that all misnomers on the civil side of the court may "be-

amended and corrected instantler," it must be construed in connection with section 5681 of the same code, which provides that amendments may be made "at any stage of the cause," and, so construed, even a misnomer in a petition can not be amended after the case has been tried and a verdict and judgment rendered. *Georgia Motor Sales v. Wade*, 37 Ga. App. 24, 138 S. E. 797.

§ 5687. (§ 5103). Names of partners may be added instantler.

In a suit against several corporations to recover in one action damages for personal injuries, where the petition alleged that some of the corporations had become merged with one another, an amendment to the petition, adding as new parties two other corporations, who, it is alleged, committed the tort complained of, and praying that process issued against them, was properly allowed. *South Georgia Power Co. v. Beavers*, 39 Ga. App. 374, 146 S. E. 924.

§ 5689. (§ 5105.) Usee's name added and one or more plaintiffs may be stricken.

Initial Right to Bring Action as Prerequisite.—A plaintiff without the legal or equitable right to maintain a suit cannot amend so as to sue for the use of another. *Ludlam Constr. Co. v. Cummings*, 34 Ga. App. 786, 131 S. E. 191.

This principle was applied in a suit by a materialman who attempted to substitute the obligee for his use where he improperly brought suit in his own name against a compensated bonding company as surety, no indemnity being provided for the materialman in the bond. *American Surety Co. v. Bibb*, 162 Ga. 388, 134 S. E. 100.

Applied in *Kohn v. Colonial Hill Co.*, 39 Ga. App. 286, 144 S. E. 33.

§ 5693. (§ 5109). Amendment of process.

Cited in *Calinet v. Hare*, 37 Ga. App. 167, 168, 139 S. E. 115.

ARTICLE 2

Particular Cases

SECTION 1

Of Amending Verdicts, Judgments, and Executions

§ 5694. (§ 5110.) Amendment of verdict.

Applied as to separating the amount of the principal and interest in a lump sum verdict. *Morgan v. Colt Co.*, 34 Ga. App. 630, 130 S. E. 600.

§ 5695. (§ 5111.) After dispersion of jury.

See annotation to § 5694.

§ 5698. (§ 5114). Executions may be amended.

Conformity to Verdict.—A judgment may be amended by order of the court, in conformity to the verdict upon which it is predicated. *Jones v. Whitehead*, 167 Ga. 848, 146 S. E. 768.

SECTION 2

Amending Official Returns

§ 5700. (§ 5116.) Official entries amendable.

Where a party resorts to a traverse in order to annul the

terms and effect of an official entry, the relief obtained results from a judgment of court fixing and declaring the truth as to the controverted facts; whereas the altering by the official amending his own entry or return results, not from any compulsion of a judgment establishing the fact, but from the voluntary act of the official himself. *Schermerhorn v. National Fire Ins. Co.*, 39 Ga. App. 470, 144 S. E. 395.

§ 5701. (§ 5117.) May be made nunc pro tunc.

Applied in *Freeman v. Stedham*, 34 Ga. App. 143, 128 S. E. 702.

SECTION 4

Of Other Amendments

§ 5706. (§ 5122.) Amendment of affidavits to foreclose, etc.

The affidavit for garnishment is amendable by striking therefrom the words "for which judgment has been obtained," and inserting in lieu thereof the words "for which is now pending." *Carrollton Bank v. Glass*, 35 Ga. App. 89, 132 S. E. 238.

Applied to amendment of distress warrant which failed to allege that the tenant "is removing" or "seeking to remove" his crops from the rented premises. *Johnson v. Lock*, 36 Ga. App. 620, 137 S. E. 911.

§ 5707. (§ 5123.) Amendment of appeal and other bonds.

The bond executed by an applicant for garnishment, is amendable under this section. Where neither the obligations of the sureties are altered nor the rights of the opposite party prejudiced, such bond may be amended in any manner to conform to the requirements of the statute, without the consent of the sureties. *Carrollton Bank v. Glass*, 35 Ga. App. 89, 132 S. E. 238.

Instances of Amendments to Appeal Bonds.—The execution of a bond by the attorney in the attorney's own name for the plaintiff by name, instead of in the name of the plaintiff by the attorney, is amendable. *Whitley v. Jackson*, 34 Ga. App. 286, 129 S. E. 662.

§ 5709. (§ 5125.) Clerical mistakes may be amended.

A clerical variance in the name of the defendant as it appears in the petition and the process is curable by amendment under this section. *Grand Lodge Knights of Pythias v. Massey*, 35 Ga. App. 140, 132 S. E. 270.

Effect.—Where a party resorts to a traverse in order to annul the terms and effect of an official entry, the relief obtained results from a judgment of court fixing and declaring the truth as to the controverted facts; whereas the altering by the official in amending his own entry or return results, not from any compulsion of a judgment establishing the fact, but from the voluntary act of the official himself. *Schermerhorn v. National Fire Ins. Co.*, 38 Ga. App. 470, 144 S. E. 395.

CHAPTER 3

Of Continuances

§ 5710. (§ 5126.) But one continuance at common law.

Editor's Note and General Consideration.—The discretion in refusing a continuance was held not to be abused where a continuance had been granted at two previous terms and for one day at the third term. *Camp v. Lanier*, 36 Ga. App. 54, 135 S. E. 224. See *Yeates v. Yeates*, 162 Ga. 153, 132 S. E. 768, where a third continuance was refused.

§ 5715. (§ 5129). Continuance for absence of witnesses.

Showing insufficient to obtain continuance of murder trial under this section. *Evans v. State*, 167 Ga. 261, 262, 145 S. E. 512.

The court did not err in refusing to continue the case because of the absence of a witness who had not been subpoenaed. *Sheffield v. Sheffield*, 38 Ga. App. 685, 145 S. E. 672.

SIXTH TITLE

Of Evidence

CHAPTER 1

General Principles

§ 5731. (§ 5145). Preponderance of evidence.

Charging Section.—In the absence of a written request to do so, it was not error for the court, after charging this section to fail to give in charge § 5732, which states how the preponderance of the evidence may be determined, and what facts the jury may consider in deciding where the preponderance of the evidence lies. *Rome Ry. Co. v. King*, 33 Ga. App. 383, 126 S. E. 294; *Sims v. Sims*, 167 Ga. 537, 538, 146 S. E. 170; *Clark v. State*, 167 Ga. 341, 145 S. E. 647.

In a suit under the Federal employer's liability act, an instruction which defines "preponderance of evidence" in the language of this section. *Western & Atlantic Railroad v. Lochridge*, 39 Ga. App. 246, 147 S. E. 776.

§ 5732. (§ 5146.) How determined.

See notes to § 5731.

Number of Witnesses.—The ruling that it might amount to reversible error, in charging the provisions of this section, to fail to include in the charge the provision that "the jury may also consider the number of witnesses, though the preponderance is not necessary with the greater number," does not apply to a case where the number of witnesses on both sides are the same. *Atlanta Gas-Light Co. v. Cook*, 35 Ga. App. 622, 134 S. E. 198.

If the complaining party has introduced the greater number of witnesses, an omission to tell the jury in effect that they may take into consideration that the greater number of witnesses testified in favor of one party rather than the other, though the preponderance is not necessarily with the greater number, might be harmful error and warrant the grant of a new trial; but where, as in the instant case, the movant for new trial had introduced only three witnesses and the prevailing party had introduced nine witnesses, the omission to so charge must be treated as harmless. *Farmers' State Bank v. Kelley*, 166 Ga. 683, 144 S. E. 258.

§ 5734. (§ 5148). Matters judicially recognized.

Cited in *King Hardware Co. v. Ennis*, 39 Ga. App. 355, 360, 147 S. E. 119.

§ 5736. (§ 5150.) Estoppels.

II. ESTOPPEL BY RECORD.

Admission in Pleadings.—In *Duke v. Ayers*, 163 Ga. 444, 453, 136 S. E. 410, the court said: "His answer was filed and became a part of the record in the cause in which the judgment issued. His admission of the non-payment of this judgment was a solemn admission in judicio that the judgment had not been paid. The court acted upon it and amended the judgment as prayed. By such admission, made in judicio, the plaintiff is estopped from asserting that he had paid off this judgment at a date prior to the making of such admission."

III. ESTOPPEL BY DEED.

Conclusiveness of Recital as to Consideration.—Ordinarily,

where the statement in a deed as to its consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it can not be varied by parol. *Sikes v. Sikes*, 162 Ga. 302, 304, 133 S. E. 239.

Applied in *Hardin v. Douglas*, 168 Ga. 213, 147 S. E. 506. Cited in *Watkins Co. v. Rivers*, 37 Ga. App. 560, 140 S. E. 770.

§ 5737. (§ 5151.) Estoppel as to title to real estate.

If estoppel by acts or false declarations can in any case be the basis upon which to predicate the recovery of land, it falls clearly within the provisions of this section. *Groover v. Simmons*, 163 Ga. 778, 780, 137 S. E. 237.

Sufficiency of Evidence.—In *Seaboard Air-Line Railway Co. v. Holliday*, 165 Ga. 200, 206, 140 S. E. 507, it is said: "The plaintiff having shown by her proof that she had the legal title to the premises in dispute and was entitled to recover, and there being nothing in the evidence showing or tending to show that the defendant or any of its predecessors in title were ignorant of the true title when they purchased, the evidence failed to establish any estoppel which would preclude the plaintiff from asserting and recovering on her legal title."

§ 5739. (§ 5153.) Trustees estopped to claim title adverse to estate.

Executors.—Where the plaintiff maintained a suit for specific performance of the contract alleged, in which he sought to have decreed in himself title to the entire property owned by his testatrix at the time of her death, and devised by her and given to the executor (plaintiff) and other beneficiaries, it was held that he was estopped on the ground that he had had the will probated and qualified as executor, and continued in the office of executor for two years, during which time he had discharged the duties of his office and had paid out large sums of money; this conduct being inconsistent with his claim of title to the entire estate of his testatrix. *Hardeman v. Ellis*, 162 Ga. 664, 135 S. E. 195.

Trustee of Corporations.—The principles of this section apply to a trustee holding choses in action for a corporation. *Caswell v. Vanderbilt*, 35 Ga. App. 34, 132 S. E. 123.

§ 5740. (§ 5154.) Prima facie presumptions.

Insanity shown once to have existed is, in the absence of proof to the contrary, presumed to continue. *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S. E. 826.

§ 5743. (§ 5157.) Jury right to infer, what.

Cited in *Yellow Cab Co. v. Nelson*, 35 Ga. App. 694, 696, 134 S. E. 822.

CHAPTER 2

Of Rules Governing the Admission of Testimony

ARTICLE 1

General Rules

§ 5744. (§ 5158.) Must be relevant.

Editor's Note.—If the evidence offered by a party is of doubtful relevancy, it should nevertheless be admitted and its weight left to the jury. Even where irrelevant evidence is admitted over timely objection, it affords no cause for a new trial, unless the nature of the evidence is such as reasonably to prejudice the rights of the objecting party. *Continental Trust Co. v. Bank*, 36 Ga. App. 149, 136 S. E. 319.

§ 5745. (§ 5159.) Character and conduct of parties.

Applied in *Swinney v. Wright*, 35 Ga. App. 45, 48, 132 S. E. 228.

§ 5746. (§ 5160.) Burden of proof.

The burden of proof of the lack of consideration to a contract falls upon the party asserting the defense. *Bankers Trust v. Hanover Nat. Bank*, 35 Ga. App. 619, 134 S. E. 195.

Applied in *Kimsey v. Rogers*, 166 Ga. 176, 180, 142 S. E. 667.

Not applied to defendant not testifying where plaintiff has not carried burden of proof. *Seagraves v. Couch*, 168 Ga. 39, 147 S. E. 61.

§ 5748. (§ 5162.) Best evidence.

Where it is material to prove that a witness has been convicted of an offense, the best evidence of that fact is the record of the conviction. *Lovinger v. The State*, 39 Ga. App. 116, 117, 146 S. E. 346.

Rulings on admissibility of evidence on ejectment trial, not erroneous. *Blackwell v. Houston County*, 168 Ga. 248, 147 S. E. 574.

§ 5749. (§ 5163.) Failure to produce evidence.

The instructions to the jury as to the presumption against a party failing to produce evidence in his power or within his reach were authorized by the facts. *Layfield v. O'Neill*, 37 Ga. App. 265, 139 S. E. 924.

§ 5751. (§ 5165.) Positive and negative testimony.

In General.—Law and logic both recognize the fact that testimony as to a thing may be positive, negative, or contradictory. Indeed, the rules of evidence announced in our Civil Code are for the most part, in essence, principles rather of logic than of law." *Hughes v. Etheridge*, 39 Ga. App. 730, 733, 148 S. E. 358.

Credibility of Witnesses.—*Carter v. State*, 34 Ga. App. 230, 129 S. E. 10, following Ga. Code 1926.

Cited in *Yeates v. Yeates*, 162 Ga. 153, 132 S. E. 768.

§ 5754. (§ 5168.) Officer de facto.

Applied in *Howell v. State*, 162 Ga. 14, 134 S. E. 59, to establish that deceased was a deputy sheriff.

§ 5759. (§ 5172.) Secondary evidence, when admitted.

Accessibility or Diligence.—*Beall v. Francis*, 163 Ga. 894, 137 S. E. 251, applying principle announced in Ga. Code 1926.

Certified Copy of Marriage Contract.—It appearing from the record that both parties to an alleged marriage contract were dead, and that it could not be found among their papers the court did not err in admitting, as secondary evidence of the contents of such paper, certified copy of a record in the office of the clerk of the superior court of the county in which the maker of the instrument died. *Beall v. Francis*, 163 Ga. 894, 137 S. E. 251.

ARTICLE 2

Of Hearsay

§ 5763. (§ 5176.) Sometimes original evidence.

A memorandum found on the person of deceased was held admissible on trial for murder, as original evidence under this section. *Etheridge v. State*, 163 Ga. 186, 199, 136 S. E. 72.

Applied in *Davis v. Farmer's Bank*, 36 Ga. App. 415, 422, 136 S. E. 816; *Alvation Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S. E. 781.

§ 5764. (§ 5177.) Pedigree, how proved.

Where proof of the pedigree of plaintiffs, their parents,

and the heirs at law of the latter, was essential to enable the plaintiffs to recover, and an affidavit of a person since deceased, related by blood to such parties, contained declarations establishing such pedigree, such affidavit was admissible to prove such pedigree, and was not objectionable on the ground that the declarations were hearsay and not binding on the defendants. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 141 S. E. 653.

Where such affidavit contained declarations tending to establish such pedigree, and contained other statements which were inadmissible if properly objected to, and where the admissibility of such affidavit was objected to as a whole, upon the ground that it was hearsay and not binding upon the defendants, its admission over such objection is not ground for a new trial. *Massell Realty Co. v. Hanbury*, 165 Ga. 534, 141 S. E. 653.

§ 5767. (§ 5180.) Declarations of persons in possession.

Applied in *Crider v. Woodward*, 162 Ga. 743, 755, 135 S. E. 95; *Smith v. Lemon*, 166 Ga. 93, 142 S. E. 554; *Smith v. Smith*, 167 Ga. 368, 369, 145 S. E. 661.

§ 5768. (§ 5181.) Of deceased persons.

See notes to § 2366(71).

It was permissible for the defendant to prove that a few months before applying for the insurance the insured made to third persons declarations contrary to the facts stated in the application, the same being admissible as declarations of a person, since deceased, against his interest, and not made with a view to pending litigation. *Henderson v. Jefferson Standard Life Ins. Co.*, 39 Ga. App. 609, 147 S. E. 901.

§ 5769. (§ 5182.) Books of account.

Order of Proof.—No foundation for their admission having been laid as required by this section the court did not err in refusing to admit in evidence certain pages from the defendants' ledger. *Kennedy v. Phillips*, 34 Ga. App. 166, 128 S. E. 779.

§ 5773. (§ 5186.) Testimony of witness on former trial.

In General.—The rule, found in this section permitting the use of former testimony of an inaccessible witness arises from the necessity of the case; and in this case, it appearing that the witness whose testimony on a former trial was introduced was, at the time of the subsequent trial, within the jurisdiction of the court and capable of testifying, though physically unable to travel to the court, and had been in that condition for about two years, and it not appearing why interrogatories for the witness had not been sued out or his depositions obtained as provided by law, the court erred in allowing the introduction of the former testimony. *Herndon v. Chamberlain*, 39 Ga. App. 207, 146 S. E. 503.

Inaccessibility. — *Allen v. Davis*, 34 Ga. App. 5, 129 S. E. 74, applying principle stated in Ga. Code, 1926.

ARTICLE 3

Of Admissions and Confessions

§ 5775. (§ 5188.) Admissions in pleadings, how far evidence.

Pleadings Stricken or Withdrawn.—Where a part of a petition or of a plea is stricken by amendment, the stricken part may, if pertinent to any issue remaining in the case, be offered in evidence; but, unless so offered and admitted in evidence, it is not evidence for the consideration of the jury or proper matter for argument of counsel, save only where the amendment is made after the evidence is closed. *Lydia Pinkham Medicine Co. v. Gibbs*, 108 Ga. 138, 33 S. E. 945; *Alabama Mid. R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794. A different rule is applicable to parts of pleadings that are not stricken. *Continental Trust Co. v. Bank*, 36 Ga. App. 149, 136 S. E. 319.

§ 5776. (§ 5189.) Parties to record.

Admissions of Executors, etc.—On the investigation of an issue of *devisavit vel non*, the admission of an executor before qualification, or of a legatee, unless the sole legatee, shall not be admissible in evidence to impeach the will. To this general rule there is an exception: If the admission be in reference to the conduct or the acts of the executor or legatee himself as to some matter relevant to the issue on trial, the same will be admitted to impeach the will, although made by the executor before qualification, or by a legatee who is not the sole legatee. *Brown v. Kendrick*, 163 Ga. 149, 135 S. E. 721.

Same—Before Execution of Will.—Declarations made by a person before the execution of a will, but who is afterwards named therein as executor and a legatee, are inadmissible to impeach the will as those of an executor and legatee. *Brown v. Kendrick*, 163 Ga. 149, 135 S. E. 721.

Declarations or admissions of the propounder of a will, made before the execution of the instrument and before he became clothed with the trust, are inadmissible to impeach the will when offered by caveators as the declarations or admissions of a party to the record. *Brown v. Kendrick*, 163 Ga. 149, 135 S. E. 721.

Declarations as to Title.—In the trial of a claim case declarations of a defendant in execution, made after the pendency of litigation and prior to the time of levy, but at a time when she was not in possession of the property levied on, that she owned such property, are not admissible as evidence and of no probative value even if admitted without objection. *Nelson v. Brannon*, 32 Ga. App. 455, 123 S. E. 735 and citations. *McSwain v. Estroff*, 34 Ga. App. 183, 129 S. E. 16.

An extrajudicial statement respecting the title to the property levied on, made by the defendant in *fi. fa.* in a claim case, is not inadmissible under this section as being an admission, when it is offered and admitted in evidence solely for the purpose of impeaching the testimony of the defendant in *fi. fa.* *Nesmith v. Nesmith*, 37 Ga. App. 779, 142 S. E. 176.

Admissions in *Fi. Fa.* Claim Cases.—The provision of this section upon the subject of the admissibility of admissions of defendants in *fi. fa.* in claim cases, has no reference to the competency of a defendant in *fi. fa.* as a witness in the trial of such a case, and would be no authority for excluding his testimony on objection of the plaintiff in *fi. fa.* when offered by the claimant. *Cornelia Bank v. Taylor*, 37 Ga. App. 538, 140 S. E. 901.

Applied in *Jenkins v. Best Trading Co.*, 39 Ga. App. 214, 146 S. E. 512; *Bacon v. Hinesville Bank*, 38 Ga. App. 422, 144 S. E. 125.

§ 5779. (§ 5192.) Of agents.

See notes to § 3606.

Although the admissions of an agent, made during the existence and in pursuance of his power, are evidence against the principal under this section, the court erred in admitting the declarations of the defendant's bookkeeper with reference to the quality of the commodity furnished, where it appeared that the declarations were not made during the existence of any power delegated to the bookkeeper to act for the defendant in accepting the goods sued for, but were in fact made long after the time when the goods were received and accepted, and where it further was not made to appear that the bookkeeper was at any time clothed with authority to act for the defendant in accepting or rejecting the commodity furnished and sued for. *Smith v. Vaughn*, 37 Ga. App. 558, 140 S. E. 892.

§ 5781. (§ 5194.) Admissions improperly obtained.

Applied in *Duncan v. Bailey*, 162 Ga. 457, 134 S. E. 87, to reject admission made with view of compromise.

Applied also in *Slade v. Raines*, 165 Ga. 89, 139 S. E. 805, as to admission tending to compromise.

§ 5783. (§ 5196.) Entire conversation.

Does Not Affect Probative Value.—This section 5873 prescribes a rule as to the admissibility of testimony, and not a rule for the determination of its probative value. *Scott v. Gidelight Manufacturing Co.*, 37 Ga. App. 240, 241, 139 S. E. 686.

Where a witness testified that as to whether or not he had any independent recollection outside of a report he would not be positive, that only from the report did he

know that the defendant told him that the defendant was a member of a partnership, the testimony of the witness was admissible, under section 5873 and its probative value was for the jury. *Scott v. Gidelight Manufacturing Co.*, 37 Ga. App. 240, 139 S. E. 686.

Waiver.—Where only that part of this memorandum used by the witness to refresh his recollection which contained the statement made by the defendant with references to the partnership was admitted in evidence at the instance of the party who offered the witness, over objection urged by the opposite party that it was inadmissible, the putting in evidence later by the latter party of the remainder of the memorandum amounted to a waiver of the objection urged by him to the admission of that part of the memorandum with reference to the partnership. *Scott v. Gidelight Manufacturing Co.*, 37 Ga. App. 240, 241, 139 S. E. 686.

§ 5785. (§ 5198.) Confidential communications, etc.

Communications Overheard Admissible.—Confidential communications between the husband and wife overheard by a third person are not excluded under this clause of this section. *Sims v. State*, 36 Ga. App. 266, 136 S. E. 460.

Terms of Attorney's Contract.—The terms of an attorney's contract do not come within the privilege provided by this section. *Bank v. Farmers State Bank*, 161 Ga. 801, 816, 132 S. E. 221.

Letters written by the wife to the husband, found after his death by his administrator in his safety-deposit box in a bank, and taken therefrom by the administrator and produced by him in court and introduced against the wife upon her trial for the homicide of her husband, were improperly admitted. *McKie v. State*, 165 Ga. 210, 140 S. E. 625.

§ 5786. (§ 5199.) Attorney and client.

Communications between client and attorney are excluded from public policy, and are incompetent as evidence against the client upon her trial for the homicide of her husband; and this is so whether such letters were voluntarily produced by the attorney to be used against the client, or were surreptitiously or otherwise taken from the possession of the attorney. *McKie v. State*, 165 Ga. 210, 140 S. E. 625.

ARTICLE 4

Of Parol Evidence to Affect Written.

§ 5788. (§ 5201.) General rule.

Subsequent Agreement.—The rule of this section is not violated by proof of a new and distinct subsequent agreement in the nature of a novation. *Wimberly v. Tannei*, 34 Ga. App. 313, 129 S. E. 306.

See notes to § 3258.

Division of Consideration.—While proof of parol contemporaneous agreements is generally inadmissible to add to, take from, or vary a written contract, the allegations of the petition setting forth the division to be made of the consideration to be paid to the co-obligees under the contract do not come within the inhibition of these sections of the code, since such alleged facts in nowise add to, take from, or vary the terms of the written instrument, but merely set forth the respective interests of the obligees. *Bernstein v. Fagelson*, 38 Ga. App. 294, 296, 143 S. E. 237.

Statements Prior to Execution of Instrument.—Parol evidence as to the terms of the agreement, and as to statements of the defendant made previously to the execution of the paper, is ineffectual to vary the terms of the written instrument, even though admitted without objection. *Cleg-horn v. Shields*, 165 Ga. 362, 141 S. E. 55.

Applied in *McClure v. Farmers' & Merchants' Bank*, 39 Ga. App. 753, 758, 148 S. E. 341; *Deen v. Bank of Hazlehurst*, 39 Ga. App. 633, 147 S. E. 909; *LaGrange Female College v. Cary*, 168 Ga. 291, 147 S. E. 390.

§ 5789. (§ 5202.) Contemporaneous writings.

If the date of an entry is uncertain because of illegibility of the handwriting, this would constitute an ambiguity,

and make a jury question. *Bolton v. Keys*, 38 Ga. App. 573, 577, 144 S. E. 406.

§ 5790. (§ 5203.) Void instruments.

Contract to Evade Usury, Penalty or Forfeiture.—It is always permissible to show by parol evidence that a paper is but a cover for usury, penalty, forfeiture, or other illegal advantage to one of the parties. For if the law did not sedulously disregard form and seek for substance, nothing would be easier than its evasion by giving innocent names to prohibited acts. *Flood v. Empire Invest. Co.*, 35 Ga. App. 266, 270, 133 S. E. 60.

§ 5794. (§ 5207.) Other cases.

Subsequent Agreement.—See note to sec. 5788. The new agreement contemplated by this section must be based upon a valuable consideration and embody the essentials of a new contract. *Guthrie v. Rowan*, 34 Ga. App. 671, 131 S. E. 93.

May Not Be Invoked to Change Law. — Custom may some times be invoked as entering into a contract, or supplying incidents, but not to change the law. *Ponder & Co. v. Mutual Benefit Life Ins. Co.*, 165 Ga. 366, 140 S. E. 761.

§ 5795. (§ 5208). Receipts.

Where a written lease states that the rent is a certain amount and contains a mere recital that it is paid, it is permissible to show by parol testimony that only a part of the rent was paid at the execution of the agreement and that the balance is still unpaid. *Googe v. York*, 38 Ga. App. 62, 142 S. E. 562.

But where a contract calls for the payment of money at a certain time, evidence of a parol agreement at variance with the writing as to such matter is not admissible. *Googe v. York*, 38 Ga. App. 62, 142 S. E. 652.

CHAPTER 3

Of Records and Other Written Evidence

ARTICLE 1

Of Records and Public Documents

§ 5798. (§ 5211). Exemplifications.

Cited in Manley, v. State, 166 Ga. 563, 580, 144 S. E. 170.

§ 5803. (§ 5216). Exemplification of municipal records, etc.

Erroneous admission in evidence of pamphlet designated as code of city ordinances, with parol evidence that city was operated thereunder. *W. & A. R. Co. v. Peterson*, 168 Ga. 264, 147 S. E. 513.

§ 5821. (§ 5234.) Effect of judgment on party vouched into court.

Use of Former Judgment Where Party Was Vouched.—There is no error in introducing a judgment against a vendee of a stolen car, taking the car away from the vendee, in an action by the vendee against the vendor for the purchase money, where the vendee gave the vendor notice of the former suit and the vendor failed to defend. *Barrett v. Miller*, 36 Ga. App. 48, 135 S. E. 111.

Applied in Manget v. National City Bank, 168 Ga. 876, 882, 149 S. E. 213.

Cited in Lifsey v. Finn, 38 Ga. App. 671, 673, 145 S. E. 519.

ARTICLE 2

Of Private Writings

§ 5828. (5239). Production of proof.

Cited in Burt v. Gooch, 37 Ga. App. 301, 306, 139 S. E. 912.

§ 5833. (§ 5244.) Subscribing witness, exceptions.

Bond for Title.—Where a bond for title admitted over objection is only collaterally material, it falls within this exception. *Chance v. Chance*, 163 Ga. 267, 135 S. E. 923.

The conveyance of the timber involved in this case was not officially attested or probated, and for this reason it was not properly recorded; and it does not fall within any of the exceptions specified in this section of the code. *Hines v. Moore*, 168 Ga. 451, 148 S. E. 162.

Cited in Burt v. Gooch, 37 Ga. App. 301, 306, 139 S. E. 912.

§ 5834. (§ 5245.) Other proof.

Circumstantial Evidence.—The existence and genuineness of a deed may be proved by circumstantial evidence. *Campbell v. Sims*, 161 Ga. 517, 131 S. E. 483.

§ 5835. (§ 5246). Handwriting.

Applied in Guthrie v. Harper, 167 Ga. 588, 592, 146 S. E. 320.

§ 5836. (§ 5247.) Comparison of hands.

Signatures.—The jury may render a verdict establishing the genuineness of an instrument from a comparison between the disputed signature and other signatures of the defendant which are admittedly genuine, and from evidence that the disputed signature "favors," "looks very much like," "bears a great resemblance to," and "is the same kind of handwriting" as the admittedly genuine signatures. *Collins v. Glisson*, 35 Ga. App. 111, 132 S. E. 114.

Comparison of Handwriting.—The court erred in admitting in evidence the writings offered for the purpose of comparison of handwriting, over the timely objection that they were not submitted to the opposite party before he announced himself ready for trial. *Thomas v. The State*, 39 Ga. App. 659, 148 S. E. 277.

CHAPTER 4

Of the Production of Papers

ARTICLE 1

Notice to Produce

§ 5837. (§ 5248.) Production of books, etc., may be compelled.

There was no reversible error in overruling the demurrer on the ground that the notice to produce fails to describe with sufficient definiteness the receipts and other papers connected with the policy of insurance. *Life, etc., Ins. Co. v. Burkett*, 38 Ga. App. 328, 144 S. E. 29.

CHAPTER 5

Of Oral Testimony

ARTICLE 1

Of Witnesses, Their Attendance and Fees

§ 5849. (§ 5260.) Subpoena.

Appeal or New Trial—Letter as Notice.—Before the presumption of the receipt of a letter by the addressee arises, so as to constitute a sufficient notice under this section the evidence must affirmatively show that the letter was written, properly addressed and stamped, and mailed. *Rowland v. State*, 34 Ga. App. 689, 690, 131 S. E. 96.

§ 5852. (§ 5263.) Failure to attend.

Forcing Attendance and Punishment of Witnesses. — Where a witness has been subpoenaed to attend the superior court and fails to obey the precept, the court may, under this section, proceed by attachment to compel the attendance of such witness, and also to punish him by a fine not exceeding three hundred dollars. But in such a case section 4849, par. 5 does not apply. *Pullen v. Cleckler*, 162 Ga. 111, 132 S. E. 761. See annotations to section 4849, par. 5.

ARTICLE 2

Of the Competency of Witnesses

§ 5856. (§ 5267.) Court decides competency.

Child of Tender Years.—Where, under the proof a child of five years was not shown to possess sufficient intelligence to understand the nature of an oath, or the penalty for its violation, it was held that the court erred in permitting the witness to testify. *Edwards v. State*, 162 Ga. 204, 132 S. E. 893.

It is within the discretion of the trial judge to determine whether or not a boy of nine years is competent as a witness; and where the judge examines such boy as to his understanding of the nature of an oath, and decides that he is competent to testify, a new trial will not be granted unless it appears that the discretion of the judge has been abused. *Bell v. State*, 164 Ga. 292, 138 S. E. 238.

Applied in *Goodson v. State*, 162 Ga. 178, 132 S. E. 899.

§ 5858. (§ 5269.) Who are competent to testify.

See notes to § 5776.

Witness Present in Transaction.—The fact that evidence by a disinterested witness may have been adduced for the plaintiff, a personal representative, in support of a transaction between the deceased and defendant would not operate to alter the general rule. *Shippey v. Carpenter*, 36 Ga. App. 61, 135 S. E. 220.

But the defendant may impeach the testimony of the plaintiff's witness by denying that such witness was present when the agreement between the decedent and himself was made. *Shippey v. Carpenter*, 36 Ga. App. 61, 135 S. E. 220.

Grantor as Witness.—In an action of ejectment, the opposite party to the deceased grantee of a deed is incompetent under this section to testify in her own behalf to conversations and transactions with such deceased person affecting adversely the title conveyed by the deed. *Sikes v. Sikes*, 162 Ga. 302, 303, 133 S. E. 239.

Party to Testamentary Contract. — Where a nephew and uncle contracted so that the property passing to the uncle's wife should become the nephew's upon her death, the nephew is not a competent witness as to the contract in an action of specific performance by the nephew against the wife to enforce the contract. *Hardeman v. Ellis*, 16 Ga. 664, 667, 135 S. E. 195.

Actions to Recover Purchase Price of Partnership. — On the trial of an action to recover from a partnership a sum

paid by the plaintiff on the purchase-price of the partnership business, the death of a member of the firm did not render inadmissible as evidence for the plaintiff a letter addressed to the firm by the plaintiff, in the lifetime of that member, stating that the latter told him that the firm would return the money. *Saunders v. Hudson*, 34 Ga. App. 752, 131 S. E. 115.

Testimony of Interpleader Competent When Representative Does Not Object.—On the trial of an action instituted by an administrator praying for direction by the court in the distribution of the estate of his decedent, testimony by one of the interpleading claimants, tending to show an executed contract in parol under which she was entitled to the estate, was not subject to exclusion on the objection of the other interpleaders (the administrator not objecting) upon the ground that the witness was incompetent to give such testimony, because it was as to transactions or communications with the decedent whose administrator was a party. The administrator was not seeking a recovery, and was not interested in the result save as a stakeholder or a third party entitled to maintain a petition for interpleader. *Cooper v. Reeves*, 161 Ga. 232, 131 S. E. 63.

Witness Testifying against Interests.—Where the witness is not a party to the suit, and is not testifying in his own interest, but is testifying against his interest, he does not fall within the inhibition of this paragraph of this section. *Chance v. Chance*, 163 Ga. 267, 135 S. E. 923.

Alleged Agent of Defendant, Witness against Administrator.—That a husband was present and looking after the transaction when his wife executed a deed of conveyance did not raise the implication, as matter of law, that he was her agent, and did not disqualify him as a witness on the trial of a suit defended by her, in which the administrators of the deceased grantee in the deed were plaintiffs; it not otherwise appearing that he was her agent, or that he looked after the transaction on her behalf, or that he had a legal or pecuniary interest in the result of the suit. *Sikes v. Sikes*, 162 Ga. 302, 133 S. E. 239.

Paragraph 1 of this section is not to be so extended by construction as to embrace cases not strictly within its letter. When a plaintiff institutes a suit and dies pendente lite, and his executor is made a party in his stead, such suit is not one instituted by the executor, and the surviving defendant is not incompetent to testify as to transactions or communications with the deceased plaintiff. *McLendon v. Baldwin*, 166 Ga. 794, 144 S. E. 271.

The testimony of a witness, since deceased, given under oath on a former trial of the same case is admissible on the subsequent trial thereof. *McLendon v. Baldwin*, 166 Ga. 794, 144 S. E. 271.

Administrator not incompetent as agent or as estoppel trustee, from testifying for his son suing to recover estate on oral agreement. *Hankinson v. Hankinson*, 168 Ga. 156, 161, 147 S. E. 106.

Heirs competent to testify as to contract of advancement to one of them in action by his creditor to subject land advanced. *Home Mixture Guano Co. v. McKeone*, 168 Ga. 317, 147 S. E. 711.

Paragraph 8.—Where a party to a cause is sworn as a witness in his own behalf on the trial of a case which he loses, and where he moves for a new trial and files therewith a brief of his testimony which is duly approved by the court and made a part of the record, such testimony amounts to a deposition within the meaning of paragraph 8 of the section. *McLendon v. Baldwin*, 166 Ga. 794, 144 S. E. 271.

Where the surviving party, after the death of the party whose testimony is so preserved, introduces such testimony on a trial of the case, he is a competent witness to rebut such testimony. *McLendon v. Baldwin*, 166 Ga. 794, 144 S. E. 271.

Testimony of Defendant Who Was Also Administrator.—The court properly admitted the testimony of one of the joint defendants, who was also an administrator of the grantor in the deed, over the objection that the witness was an administrator of the grantor and therefore incompetent to testify to a fact. There is not merit in this objection. The situation here arising clearly falls within none of the exceptions to the general rule as to the competency of witnesses, contained in this section. *May v. Leverette*, 164 Ga. 552, 553, 139 S. E. 31.

The plaintiff in a suit for specific performance of an alleged oral gift of land, defended by the administrator of the deceased donor, was incompetent as a witness to give testimony of going into possession and making of specified improvements during the lifetime of the decedent, and referring to transactions with him which if alive he could deny, explain, or rebut. *Odum v. McArthur*, 165 Ga. 103, 139 S. E. 870.

Applied as to transactions, in *Campbell v. Sims*, 161 Ga.

517, 520, 131 S. E. 483; as to transferee, in *Campbell v. Sims*, 161 Ga. 517, 520, 131 S. E. 483; also in *Winkles v. Drake*, 165 Ga. 335, 141 S. E. 67; *Farmers' & Merchants' Bank v. Miller*, 37 Ga. App. 668, 669, 141 S. E. 419.

§ 5862. (§ 5273.) Idiots, etc.

Evidence Admitted Erroneously.—When an examination by the court shows that the child has no such knowledge it is error to permit the child to testify over proper objection. *Horton v. State*, 35 Ga. App. 493, 133 S. E. 647.

§ 5865. (§ 5276.) Decision by inspection.

See notes to § 5856.

ARTICLE 3

Of the Examination of Witnesses

§ 5869. (§ 5280.) Separate examination.

Liberal Construction.—In administering the rule of this section, the judge is invested with a broad discretion which is to be liberally construed, and the exercise of this discretion will not be controlled or overruled except in case of an abuse of discretion. Under the circumstances disclosed by the record in this case we can not hold that the trial judge abused his discretion, and that the exclusion of the witness in the circumstances stated would require the grant of a new trial. *Groover v. Simmons*, 161 Ga. 93, 129 S. E. 778.

§ 5874. (§ 5285.) Opinions of witness.

Opinion—Facts upon Which Conclusion Based. — On the trial of an issue as to general mental incapacity to make a will, a subscribing witness to the paper propounded as a will may give in evidence his opinion as to whether the testator at the time of executing the paper appeared "to have sense enough to know who his children were," with or without stating any other facts on which his opinion was based. *Dyar v. Dyar*, 161 Ga. 615, 131 S. E. 535.

The opinion of a witness may be given in evidence as to the insolvency of a party, provided it is accompanied by the facts upon which the opinion is founded. *Bennett v. American Bank, etc., Co.*, 162 Ga. 718, 729, 134 S. E. 781.

The court properly rejected the testimony of an affiant, that as the result of years of study, observation, and experience, he was firmly convinced that the Masonic Order in America is purely an altruistic, charitable institution, and that the practice of charity is the real excuse for its existence. The question was not one of opinion; and if it had been, such testimony was a mere opinion and conclusion of the witness, who was not shown to be an expert, without the facts upon which such opinion and conclusion was based. *Atlanta Masonic Temple Co. v. Atlanta*, 162 Ga. 244, 133 S. E. 864.

Same—Specific Instances of Question of Opinion. — The question as to whether the car furnished could and did afford proper refrigeration between the points of shipment, when re-iced at regularly established icing stations, was held one of opinion. *Central, etc., R. Co. v. Evans*, 35 Ga. App. 438, 143 S. E. 122.

Cited in *Humphreys v. State*, 35 Ga. App. 386, 133 S. E. 518.

§ 5875. (§ 5286.) Market value, how proved.

The jury are not bound by the opinion of experts as to value. *Black v. Automatic Sprinkler Co.*, 35 Ga. App. 8, 131 S. E. 543.

Specific Applications.—Testimony as to the value of services rendered is in the nature of opinion evidence. *Western, etc., Railroad v. Townsend*, 36 Ga. App. 70, 72, 135 S. E. 439.

A witness may give his opinion as to market value of notes or other property, and as to the solvency of a bank, after having stated the fact or facts upon which he bases his opinion. The weight to be given such opinion is a matter for the jury, who have power to disregard the reasons given. *Bitting v. State*, 165 Ga. 55, 139 S. E. 877.

Testimony as to the market value of property being in the nature of opinion evidence, and its probative value being dependant on the character and intelligence of the witness and his opportunity of forming a correct judgment as

to the value of the property, it is not conclusive upon the jury. *Central of Ga. Ry. Co. v. Cowart & Son*, 38 Ga. App. 426, 144 S. E. 213.

When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of his investigation, provided the books themselves are accessible to the court and the parties. *Bitting v. State*, 165 Ga. 55, 139 S. E. 877.

Applied in *Blaylock v. Walker County Bank*, 36 Ga. App. 377, 136 S. E. 924.

ARTICLE 4

Impeachment of Witnesses

§ 5879. (§ 5290.) Impeaching own witness.

Examination of Opposite Party.—An opposite party may be cross-examined without entitling counsel for any opposite party or parties, as a matter of absolute right, to cross-examine the witness. *Scarborough v. Walton*, 36 Ga. App. 428, 136 S. E. 830.

Defendant can introduce former testimony of deceased plaintiff, and then impeach it by his own testimony. *McLendon v. Baldwin*, 166 Ga. 794, 798, 144 S. E. 271.

§ 5880. (§ 5291.) Impeached by disproving facts testified to.

The charge of court giving this and the following sections, not subject to exceptions because of verbal inaccuracies. *Bart v. Scheider*, 39 Ga. App. 467, 469-71(3), 147 S. E. 430.

§ 5881. (§ 5292.) By contradictory statements.

Sufficiency of Previous Statement.—A previous statement made by a witness, to be impeaching, must refer to matters relevant to his testimony and to the case, and must contradict some matter testified to by him. Otherwise, the attempt to impeach will be unsuccessful. *Tanner v. State*, 163 Ga. 121, 129, 135 S. E. 917.

In the present case the jury could have found that the engineer was impeached by a contradictory statement previously made by him as to a matter relevant to his testimony and to the case. *Central of Ga. Ry. Co. v. Pitts*, 38 Ga. App. 780, 145 S. E. 518.

§ 5883. (§ 5294.) Credibility of witnesses.

Applied in *United States Fidelity Co. v. Hall*, 34 Ga. App. 307, 129 S. E. 305.

§ 5884. (§ 5295.) What credit to impeached witness.

Section Analyzed with Respect to Contradictions. — The phrase "successfully contradicted" applies where a witness has not been really impeached, but only where there has been an effort to impeach. In the next sentence of the section there is a provision applicable to a witness who has been really impeached, or "successfully" impeached. It will be observed that the language employed in this last referred sentence fits exactly the definition of perjury. The conclusion, therefore, is that when one has been guilty of perjury, he should not be believed, unless corroborated. The last sentence applies where the circumstances do not prove the witness guilty of perjury. *Reed v. State*, 163 Ga. 206, 218, 135 S. E. 748.

Same—Use of "Successfully Impeached."—The expression "successfully impeached" is inappropriate because it is confusing to use it in place of the words "successfully contradicted," as used in this section. *Reed v. State*, 163 Ga. 206, 218, 135 S. E. 748.

ARTICLE 5

Public Excluded, When.

§ 5885. (§ 5926). When evidence vulgar, etc.

Under neither the constitution nor the statute laws of Georgia is it ever reversible error for a trial judge, in his discretion, to allow the public to occupy seats in the courtroom as long as their conduct is orderly, peaceful, and does not tend to obstruct justice. *Lancaster v. State*, 168 Ga. 470, 475, 148 S. E. 139.

CHAPTER 6

Of Interrogatories and Depositions

ARTICLE 1

Commissions, How Issued and Returned

§ 5886. (§ 5297.) Who may be examined on interrogatories.

See annotations to § 5910.

ARTICLE 3

Exceptions to Commissioners

§ 5904. (§ 5314). Exceptions, when taken.

Even if the intervenors were parties in the trial, the objection was made as is required by this section, and it was not made to appear that the intervening defendants were ignorant of the defect in service prior to the trial. *Chamblee v. Wayman*, 167 Ga. 821, 146 S. E. 851.

ARTICLE 5

Evidence before Court Commissioners

§ 5910. (§ 5315.) Depositions taken without order or commission.

Effect of Refusal to Testify.—A party to a pending action who is a competent and compellable witness served with proper notice for the taking of his depositions, but refuses to answer proper questions upon the sole ground that he does not come within any of the classes specified in section 5886, is guilty of contempt. *Stephens v. Liquid Carbon Co.*, 36 Ga. App. 363, 136 S. E. 808.

SEVENTH TITLE

The Verdict and Judgment

CHAPTER 1

Verdict and Judgment

ARTICLE 1

Of the Verdict and Its Reception

§ 5926. (§ 5331.) Direct verdict, when.

Sections 5168 and 5926 construed together in *Callaway v. Life Ins. Co.*, 166 Ga. 818, 144 S. E. 381.

Sufficiency of Evidence.—In *Kemp v. Rossignol*, 167 Ga. 820, 146 S. E. 897, it was held, that the evidence was not of such character as authorized the direction of a verdict for the defendant, under the provision of this section.

Testing Propriety of Directing Verdict.—Where, under all the circumstances, only one conclusion is reasonably possible, the question ceases to be issuable as one of fact and becomes a question of law. *Southern Pacific Co. v. DiCristina*, 36 Ga. App. 433, 439, 137 S. E. 79.

Converse of Section.—Where there is conflicting evidence as to material issues, it is error for the court to direct a verdict. *Bailey v. First Nat. Bank*, 34 Ga. App. 454, 129 S. E. 920.

Refusal to Direct Always Proper. — *Roberts v. Groover*, 161 Ga. 414, 131 S. E. 158.

In proceedings to probate a will, upon a caveat for mental incapacity, where the evidence did not support such incapacity, directing verdict for the propounder was held not erroneous. *Mason v. Taylor*, 162 Ga. 149, 152, 132 S. E. 893.

Applied in *Taylor v. Mentone Hotel & Co.*, 163 Ga. 357, 361, 136 S. E. 137; *Burch v. Atlantic Life Ins. Co.*, 37 Ga. App. 63, 66, 139 S. E. 123.

§ 5927. (§ 5332.) Construction of verdicts.

In General.—While it has been held that the construction of a verdict may be aided by a consideration of the pleadings, and that all the undisputed facts proved upon the trial may be examined and considered in construing the verdict, this rule of construction is to be resorted to only when the intent of the jury is not reasonably apparent from the language of the verdict itself. Where the verdict is plain and unmistakable in its terms and legal effect, it must speak for itself. *Turner v. Shackelford*, 39 Ga. App. 49, 145 S. E. 913.

Alimony.—Properly construed in view of the pleadings, the evidence, and the charge to the jury, the verdict was not void for uncertainty, although it contained no finding of the amount of alimony. *Bridges v. Donalson*, 165 Ga. 228, 140 S. E. 497.

Amount Where Verdict for Defendant.—A verdict in a trover suit, which reads, "We, the jury, find the property in dispute in favor of the defendant," will, at the instance of the defendant, be construed as a verdict finding for the defendant for the value of the property in the amount established by the plaintiff's affidavit for bail, which is corroborated by the plaintiff's own personal testimony upon the trial. This is true although the defendant may not, prior to the rendition of the verdict, have elected to take a verdict for the value of the property. *Pound v. Baldwin*, 34 Ga. App. 810, 131 S. E. 291.

A verdict is certain which can be made certain by what itself contains or by the record. *Smith v. Cooper*, 161 Ga. 594, 595, 131 S. E. 478.

Verdicts are to be construed in the light of the pleadings and the evidence, and all that is essential to a valid verdict is substantial certainty to a common and reasonable intent. It appearing from the pleadings and evidence in the record in this case that the validity of two deeds was involved, both relating to a single transaction, the court did not err in construing the finding of the jury finding "the deed" invalid as a reference to both deeds involved in the common issue. *Short v. Cofer*, 161 Ga. 587, 131 S. E. 362.

Illustration.—On the trial of a case the jury returned the following verdict: "We the jury find in favor of the defendant. To pay Gragg Lumber Company \$1100.00, with interest at 7% from June the 21st, 1924, and all taxes up to date." Verdicts should have a reasonable intendment under this section. The verdict, construed in the light of the pleadings and the evidence, was for \$11,000.00, and not for \$1100.00, as expressed in figures in the verdict. *Gragg v. Hall*, 164 Ga. 628, 637, 139 S. E. 339.

§ 5930. (§ 5335.) Plaintiff may choose verdict.

Section Construed with Section 4494. — The plaintiff does not have the option given to him under this section, "if the defendant at the first term will tender the property to the plaintiff, together with reasonable hire for the same since the conversion, disclaiming all claim of title." In such a case the plaintiff is limited to a recovery of the property

under the tender; and is chargeable with the cost, unless it be shown that a previous demand for the property had been made and refused. *Downs Motor Co. v. Colbert*, 34 Ga. App. 542, 130 S. E. 592.

Effect of Election upon Issue.—The sole issue in the trial of an action of trover is that of title to the property in dispute; and the fact that the plaintiff may elect to take a money verdict under this section in lieu of the specific personalty claimed can in no event alter that issue. *Citizens Bank v. Mullis*, 161 Ga. 371, 131 S. E. 44.

§ 5933. (§ 5338.) Juries may sustain verdict.

Applied in *Anderson v. Howard*, 34 Ga. App. 292, 297, 129 S. E. 567.

ARTICLE 2

Of Entering Judgment

§ 5942. (§ 5347.) Nonsuit, when granted.

Evidence showing that plaintiff ought not to recover, sustains a grant of nonsuit. *Durden v. Durden*, 165 Ga. 813, 142 S. E. 151.

Applied in *Morris v. Peachtree Heights Park Co.*, 38 Ga. App. 303, 143 S. E. 909.

Cited in *Peek v. Irwin*, 164 Ga. 450, 452, 139 S. E. 27.

ARTICLE 3

Of the Effect and Lien of Judgments

§ 5943. (§ 5348.) Conclusiveness of judgments.

The judgment regularly rendered between the creditor and debtor, until set aside for fraud, accident, mistake, or other cause, was conclusive and binding between them as to the amount of the indebtedness. The agreement alleged to have been made between the parties therefore was without consideration and not binding. *Creswell v. Bryant Hardware Co.*, 166 Ga. 228, 142 S. E. 885.

§ 5944. (§ 5349.) Judgments at same term of equal date.

Applied in *Kirsch v. Witt*, 37 Ga. App. 402, 140 S. E. 511; *Herndon v. Braddy*, 39 Ga. App. 165, 146 S. E. 495.

§ 5946. (§ 5351.) Dignity and binding effect of judgment.

Cited in *Burt v. Gooch*, 37 Ga. App. 301, 306, 139 S. E. 912.

§ 5948. (§ 5353.) Judgments do not bind choses in action.

The right of a partner to a homestead exemption out of the property of his firm is a chose in action; and the assignment of such chose in action by the partner, before the institution of a collateral proceeding or a garnishment, passes to the assignee the property in the chose in action assigned, free from the lien of a general judgment previously rendered against the assignor. *Citizens' Bank & Trust Co. v. Pendergrass Banking Co.*, 164 Ga. 302, 138 S. E. 223.

ARTICLE 5

How Attacked, and Herein of Motion in Arrest of Judgment

§ 5957. (§ 5362.) Motion in arrest of judgment.

Under the Civil Code, §§ 5957, 5958, and rulings in cases

cited in the opinion, there was no error in affirming a refusal to set aside a judgment on motion filed after the term when it was rendered. *Gravitt v. State*, 165 Ga. 779, 142 S. E. 100.

A motion to set aside a judgment will lie for any defeat not amendable which appears on the face of the record or pleadings (Civil Code of 1910, § 5957), but since a verdict cures any defect which might have been corrected by amendment, even though it could be assumed that the plaintiff could have been required to amend his petition so as to allege specifically and in terms that the defendant was indebted to him as the payee on the unconditional, undorsed, and unpaid promise to pay, the petition did not fail to set forth a cause of action, it being the general rule that the payee of a note is presumed to continue in its ownership. *Hobbs v. Citizens Bank*, 32 Ga. App. 522(4), 124 S. E. 72. See also *Strickland v. Citizens National Bank*, 15 Ga. App. 464, 83 S. E. 883; *Brooke v. Fouts*, 37 Ga. App. 563, 140 S. E. 902.

Applied in *Weems v. Kidd*, 37 Ga. App. 8, 138 S. E. 863.

§ 5958. (§ 5363.) Nature of such motion.

Applied in *Longshore v. Collier*, 37 Ga. App. 450, 140 S. E. 636; *Grogan v. Deraney*, 38 Ga. App. 287, 289, 143 S. E. 912.

§ 5960. (§ 5365.) Amendable defects, no ground to arrest.

Applied to a distress warrant containing amendable defects. *Johnson v. Lock*, 36 Ga. App. 620, 621, 137 S. E. 911.

Cited or applied in *Hudson v. Cohen*, 34 Ga. App. 119, 126 S. E. 205; *Henderson v. Ellarbee*, 35 Ga. App. 5, 6, 131 S. E. 524; *Willcox v. Beechwood Band Mill Co.*, 166 Ga. 367, 372, 143 S. E. 405; *Weems v. Kidd*, 37 Ga. App. 8, 138 S. E. 863.

§ 5961. (§ 5366.) Judgments obtained by perjury will be set aside.

Subsequent Statement of Witness as to Falsity of Evidence.—The fact that a witness for the state in a criminal case, though he be the only witness for the prosecution, has made declarations, since the trial, that this testimony given upon the trial was false, is not cause for a new trial. *Morrow v. State*, 36 Ga. App. 217, 136 S. E. 92.

§ 5962. (§ 5367.) Jurisdiction of the motion to arrest.

This provision not applied to proceeding in equity by petition as in ordinary suit. *Williamson v. Haddock*, 165 Ga. 168, 140 S. E. 373.

§ 5963. (§ 5368.) Judgments, how attacked.

Applied in *Willcox v. Beechwood Band Mill Co.*, 166 Ga. 367, 372, 143 S. E. 405.

§ 5964. (§ 5369.) Judgments, when void.

Setting Aside by Justice.—A justice of the peace has no authority to set aside a judgment rendered by him; the subsequent entering of a second judgment purporting to set aside the first mentioned judgment, was itself void and should be treated as a nullity under this section. *Edwards v. Edwards*, 163 Ga. 825, 137 S. E. 244.

Orders.—Where the judge's order shows on its face a total lack of jurisdiction, the judgment is wholly void, and may, under this section, be attacked collaterally. *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 528, 131 S. E. 517.

When Subject to Attack.—While the judgment of a court having no jurisdiction of the person against whom it is rendered may be void, where the court has jurisdiction of the subject-matter and the defendant has been served, he can not attack the judgment by affidavit of illegality. *Hamilton v. Chitwood*, 37 Ga. App. 393, 140 S. E. 518.

Proceedings in the superior court in a case where it has no jurisdiction of the subject-matter are nullities; and a judgment, after the case has been dismissed upon demurrer for lack of jurisdiction of the subject-matter, awarding compensation to receivers and their attorneys, is null and void. *Deans v. Deans*, 164 Ga. 162, 137 S. E. 829.

§ 5965. (§ 5370.) Equity may set aside judgment.

Time of Filing Petition.—Where suit is brought in equity to set aside a verdict and decree for fraud, accident, or mistake, under this and the following section, the petition as in equity causes may be filed under the § 5562, either in-term time or vacation, returnable to the next ensuing term commencing not less than twenty days from the date on which the petition is filed. *Williamson v. Haddock*, 165 Ga. 168, 140 S. E. 373.

Applied in *Bryant v. Bush*, 165 Ga. 252, 140 S. E. 366; *Ehrlick v. Bell*, 163 Ga. 547, 136 S. E. 423.

§§ 5968(a)-5968(d). Park's Code.

See §§ 5968(1)-5968(4).

§ 5968(1). Jurisdiction to set aside judgment on secured debt.—When a judgment shall be rendered upon any obligation secured by a deed to secure debt, a bond for title to realty, or a bill of sale to personality, given under section 3306 of the Civil Code, the court which rendered such judgment, or the judge thereof in vacation, shall have jurisdiction, power, and authority to vacate and set aside said judgment at any time before the sale of the property described in the deed, bond for title, or bill of sale is made, upon motion of the attorney of the plaintiff and defendant in fi. fa., and the payment of the costs. Acts 1927, p. 221.

§ 5968(2). Cancellation of fi. fa.—Whenever a judgment shall be so vacated and set aside, the clerk of the court in which it was rendered shall mark the fi. fa. issued thereon cancelled and the clerk of the Superior Court shall enter the same upon the general execution docket, and make thereon an appropriate reference to the order vacating the judgment. Whenever a judgment shall as herein provided be vacated and set aside, any deed reconveying the property to the defendant in fi. fa. for the purpose of levy and sale shall be, by virtue of the provisions hereof, automatically cancelled and rendered null and void, and the clerk of the Superior Court shall enter on the record of such deed or reconveyance, when recorded, the word "cancelled," and make appropriate reference to the order vacating the judgment.

§ 5968(3). Original status restored.—When a judgment shall be vacated and set aside as herein provided, the obligation upon which the same was rendered, as well as the deed, bond for title, or bill of sale securing the same, shall be fully restored in all respects to the original status of the same which existed prior to the commencement of the suit in which such judgment was rendered, and thereafter the same shall be for all purposes whatsoever legally of force and effect as if suit had not been instituted and judgment obtained on the said obligation.

§ 5968(4). Applicable to mortgage foreclosure.—The jurisdiction, power, and authority to vacate and set aside a judgment, as hereinbefore provided, shall extend to a judgment on purchase-money note, conditional sale contract where title is reserved as security, or bond for title is given, and all other cases where it is necessary under section 6037 of the Civil Code to re-

convey property to the defendant in fi. fa. for the purpose of levy and sale. The provisions of this Act shall also extend and be applicable in all respects to a judgment and decree foreclosing a mortgage.

ARTICLE 6

Of the Transfer of Judgments

§ 5971. (§ 5376). Joint debtors may control fi. fa., when.

Applied in *Autry v. Southern Railway Co.*, 167 Ga. 136, 142, 144 S. E. 741.

EIGHTH TITLE

Costs in Civil Cases

CHAPTER 1

Of Costs in Civil Cases

ARTICLE 1

Who Liable for Costs; Compensation of Certain Stenographic Reporters

§ 5980. (§ 5385). Who shall pay costs.

Applied in *Grizzard v. Ford*, 167 Ga. 531, 146 S. E. 126.

§ 5989(3). In counties containing cities of more than 175,000 population.—One official court reporter for each of the several divisions of the superior and city courts in counties of this State containing a city of more than 175,000 population, according to the Federal census of 1920, shall be paid out of the treasury of such county a salary to be fixed by the commissioners of roads and revenues of such county, not to exceed forty-two hundred dollars per annum, payable monthly, which salary shall be compensation in full for attendance upon, and taking stenographic notes in, any court or division thereof covered by this Act. Acts 1923, p. 104; 1925, p. 164; 1927, p. 216.

Editor's Note.—The maximum salary to be paid to a court reporter under this section was raised from three thousand dollars to forty-two hundred dollars, by the amendment of 1927.

§ 5989(7). Salary of stenographer of circuit with city of 30,000 to 52,000 inhabitants.—From and after September 1st, 1929, the compensation of any and all stenographic reporters of all judicial circuits of this State, which are now or which may be established, having therein a city with a population of not less than 30,000 nor more than 52,000 inhabitants, according to the Federal census of 1920, shall be the sum of \$250.00 per month for reporting and transcribing such criminal cases as are now required by law

to be reported, in the county wherein such city is located, said salary to be paid monthly out of the treasury of the county in which such city is located, as other court expenses are paid, and which compensation shall be in full for reporting and transcribing such criminal cases as are now required by law to be reported for and in the county in which such city is located; and in the other counties of said circuit such stenographic reporter or reporters shall receive compensation as now provided by law. Acts 1929, p. 325, § 1

CHAPTER 2

Fees of Officers of Court

ARTICLE 2

Fees of Sheriffs, Deputy Sheriffs and Bailiffs

§ 5997. (§ 5401). Fees of sheriffs.

Effect of 1918 Amendment.—While compensation for such services is provided by the act of 1918 amending this section the amounts coming to such officers for such services are not fixed and certain, but depend on the number of juries summoned by them under said act, and for this reason do not fall within the principles announced in *Lamb v. Toomer*, 91 Ga. 621, 17 S. E. 966; *Gamble v. Clark*, 92 Ga. 695, 19 S. E. 54; *Chatham County v. Gaudry*, 120 Ga. 121, 47 S. E. 634; *Clark v. Eve*, 134 Ga. 788, 68 S. E. 598; *Tucker v. Shoemaker*, 149 Ga. 250, 99 S. E. 865; *Culberson v. Watkins*, 156 Ga. 185, 119 S. E. 319; *Sammon v. Glasscock County*, 161 Ga. 893(3), 131 S. E. 881; *Baggett v. Barrow*, 166 Ga. 700, 144 S. E. 251.

Claims of sheriffs for summoning juries under the provisions of the act of 1918 amending this section fall within the provisions of the section 411 of the Code, and when not presented within twelve months after they accrue, they are barred. *Baggett v. Barrow*, 166 Ga. 700, 144 S. E. 251.

The term "each jury," as used in the 1918 amendment of this section, means each grand jury and each petit jury drawn under the provisions of sections 823, 826, 866, 874, and 875 of the Penal Code. Such term does not include tales jurors, whether personally summoned by direction of the judge or drawn to make up or complete panels of jurors. *Baggett v. Barrow*, 166 Ga. 700, 144 S. E. 251.

ARTICLE 3

Compensation of Officers When No Fees Fixed

§ 6001. Compensation to officers, how allowed.—The ordinaries of this state who by law are vested with the management of the county business, and for whom no compensation is now provided, and the sheriffs and clerks of the superior courts, for public services in relation to which existing laws provide no compensation, shall be compensated as follows, to wit: Such officers shall state their respective claims in writing, and make affidavit to the correctness and justice thereof, which so made out and verified shall be submitted to the grand juries of their respective counties at any regular term thereof at which a grand jury is impaneled, after the services rendered; provided, if such statement is not submitted at that term or at the next succeeding

term at which a grand jury is empaneled, such claim for services shall be barred; and said grand juries may in their discretion require other proof of the justness and correctness of such claims, and, when satisfied that said claims are just and correct, may allow the sum claimed, or so much thereof as they may deem right and proper; and when allowed, the ordinary of such county, or other authority levying county taxes, shall assess so much with the other county taxes as will pay the same, which when collected and paid over to the county treasurer of such county, shall be paid by him to the parties thereto, without further order, he taking a proper receipt therefor. The compensation provided for in this section shall be in full of all compensation of such officers for such services. Acts 1929, p. 171, § 1.

CHAPTER 3

Abolition of Fee System in Certain Counties

ARTICLE 1

Counties of 200,000 or More Population

§ 6017(1). County officers to receive salaries instead of fees.

Cited in *Georgia-Carolina Lumber Co. v. Wright*, 161 Ga. 281, 285, 131 S. E. 173.

§ 6017(6). Commissions for collection of corporation, occupation and other special taxes returnable to state.—Provided however, commissions now or hereafter allowed by law for the collection of corporation, occupation and other special taxes shall be collected by the officers aforesaid for the use of the State and held as public moneys belonging to the state and shall be remitted by the officer collecting the same to the State in the same manner and at the same time the taxes are remitted, and none of said commissions shall be turned into the county treasury. The provisions of this section shall not apply to counties having a population of not less than ninety thousand (90,000) nor more than one hundred and fifty thousand (150,000) inhabitants. Acts 1925, pp. 159, 160; 1927, p. 208.

Editor's Note.—The last sentence of the section was added by the amendment of 1927.

ARTICLE 2

Counties of 44,000 to 60,000 Population and Counties of 70,000 to 150,000 Population

§ 6017(7). County officers to receive salaries instead of fees; exception.—This Act shall apply to all counties in the State of Georgia having by the United States census of 1920 a population of forty-four thousand to sixty thousand inhabitants and to all counties in the State of Georgia having by the United States census of 1920 a population

of seventy thousand to one hundred and fifty thousand inhabitants and to all counties in the State which may by any future census of the United States have a population of seventy thousand to one hundred and fifty thousand inhabitants except as hereinafter provided. In all such counties the fee system for compensating the officers herein named shall be abolished except those fees that are paid by the State to the Tax Collector and Tax Receiver and the officers herein named shall thereafter be paid salaries as herein provided instead of fees as under the present system except for the fees to be paid by the State as will be hereinafter provided. Acts 1924, p. 90; 1925, p. 161; 1927, p. 207.

Editor's Note.—The phrase "except as hereinafter provided" at the end of the first sentence, was inserted by the amendment of 1927.

§ 6017(8). Salaries to be fixed annually 90 days before January 1.—The salaries, in all such counties as are described in Section 6017(7), of the Clerk of the Superior Court, (whether he be ex officio clerk of other courts or not) the Sheriff, the Ordinary, the Tax Collector, and the Tax Receiver, shall be fixed for the terms of such officers, at least ninety days before the first of January, (beginning with January, 1926), by the Commissioners of Roads and Revenues, if there be such, (whether the body shall consist of one or several commissioners) or, in event that there are no such Commissioners, the Ordinary or other County authorities having charge of the Roads and Revenues of such counties and such salaries shall be fixed for each term, at the time aforesaid, and shall not be changed during said terms. Provided that in counties having a population of not less than ninety thousand (90,000) nor more than one hundred and fifty thousand (150,000) by the census of the United States, the clerk of the Superior Court shall be paid a salary of nine thousand (\$9,000.00) dollars per annum; the sheriff a salary of seven thousand (\$7,000.00) dollars per annum; the ordinary a salary of six thousand, five hundred (\$6,500.00) dollars per annum; the tax-collector a salary of one thousand (\$1,000.00) dollars per annum for services collecting the county taxes; the tax-receiver a salary of three thousand, five hundred (\$3,500.00) dollars per annum for receiving the returns for county taxes; each of said salaries to be paid in equal monthly installments. Provided that nothing herein shall affect any fees or compensation that are now allowed by law to the said tax-collector by the State of Georgia or that may be fixed or allowed hereafter by law, it being the intent of this proviso that the fees and compensation which said tax-collector receives from the State shall not be abrogated and shall not be considered as any part of the salary he receives from the County of Chatham. Acts 1924, p. 90; 1927, p. 208.

Editor's Note.—Both of the provisos to this section were added by the amendment of 1927.

§ 6017(11). Payment of salaries, how made.—After said salaries and expenses are so fixed and determined, as provided in §§ 6017(8), 6017(9) and 6017(10), it shall be proper and lawful for the treasurer of the county, or other custodian or depository of county funds, out of the county funds

which may be paid into the county treasury of such county and derived under the provisions of § 6017(13) on or before the fifteenth day of each month, to pay out the monthly portion of such salaries and expenses to each officer herein named, who shall retain his own salary, and disburse the salaries of assistants and deputies and expenses of the office. Provided, however, that it may be lawful for the Treasurer of the County, or other custodian or depository of County funds, to anticipate the payment into the County Treasury of funds derived under the provisions of § 6017(13) and to pay out of County funds the monthly portion of such salaries and expenses to each officer herein named, as herein above provided. Such disbursement shall be made in accordance with the provisions of any local or special Act of any county affected by the provision of this Act, regulating the methods of disbursements of other county funds. Provided, that as relates to counties having a population of not less than ninety thousand (90,000) nor more than one hundred and fifty thousand (150,000) inhabitants, the words and figures, "as provided in §§ 6017(8), 6017(9) and 6017(10)" as used in this section shall not apply. Acts 1924, pp. 90, 92; 1925, p. 162; 1927, p. 209.

Editor's Note.—The last proviso was added by the amendment of 1927.

NINTH TITLE

Of Executions and Sales Thereunder

CHAPTER 1

Of Different Kinds of Executions

ARTICLE 2

Of Fi. Fas., How Levied, and Proceedings Thereon

§ 6026. (§ 5421.) Form of levy.

Cited in Wiley v. Martin, 163 Ga. 381, 136 S. E. 151; in dissenting opinion in Lane v. Bradfield, 37 Ga. App. 395, 396, 140 S. E. 417.

§ 6028. (§ 5423.) On what property first levied, right of.

Section Not Applicable to Tax Execution.—This section does not apply to tax sales. McDaniel v. Thomas, 162 Ga. 592, 133 S. E. 624.

Effect Where Defendant Not Allowed to Point out Property—Notice to Surety.—It is not a ground of illegality that the defendant surety was not notified of the impending levy and was given no opportunity to point out property either in his possession or in the possession of one of the principals in the judgment. Mulling v. Bank, 36 Ga. App. 55, 135 S. E. 222.

§ 6029. (§ 5424.) Sale of separate parcels subject to lien.

To What Liens Applicable.—Applied to the enforcement of a tax lien. Columbia Trust, etc., Co. v. Alston, 163 Ga. 83, 135 S. E. 431.

The rescission or cancellation of an executory contract for the sale of land and the release of the purchaser from the payment of the purchase-money due by him, constitute an extinguishment of the contract of sale and put an end to it, and such transaction does not amount to a sale or alienation of the property by the vendee in such contract, in the sense in which the words "sale" and "alienation" are used in this section. *Planters Warehouse Co. v. Simpson*, 164 Ga. 190, 138 S. E. 55.

The court will grant injunction against enforcement of tax executions otherwise than as here provided. *Douglas v. Hannahatchee Ranch Corporation*, 168 Ga. 238, 147 S. E. 518.

§ 6030. (§ 5425.) Growing crop to be sold, how.

Stage of Maturity When Subject to Levy.—As to crops, such as cotton, which do not mature on the stalk at one time, but whose maturity is extended throughout the latter portion of the growing season, the rational construction of this section would be, that the crop is subject to levy, whenever it has reached that stage of maturity when it is ready for harvesting to commence. *Barnesville Bank v. Ingram*, 34 Ga. App. 369, 129 S. E. 112.

§ 6031. (§ 5426.) Notice of levy on land.

*Cited in *Wiley v. Martin*, 163 Ga. 381, 384, 136 S. E. 151.

§ 6032. (§ 5427.) Setting aside execution sale.

See notes to § 4129.

Applied in *Davis v. Elliott*, 163 Ga. 169, 175, 135 S. E. 731.

Cited in *Wiley v. Martin*, 163 Ga. 381, 136 S. E. 151.

ARTICLE 3

Levy and Sale Where Defendant Has not Legal Title

§ 6037. (§ 5432.) Levy, when contract of purchase or bond for title made.

See notes to § 3298.

I. EDITOR'S NOTE AND GENERAL CONSIDERATIONS.

Applied in *Corley v. Jarrell*, 36 Ga. App. 225, 136 S. E. 177.

VI. FILING AND RECORDING.

Necessity for Filing and Recording Deed—Proper Person to Execute Deed.—Under this section, the "holder of the legal title," and not the original vendor, is the proper person to execute the quitclaim deed under the fi. fa. If a note only is transferred and no deed is made conveying the legal title to the land as security, then it is necessary, after the transferee has obtained judgment, that the vendor execute a quitclaim deed to the purchaser before the fi. fa. could have been levied, because in that event the vendor would have continued to be the holder of the legal title. *Swinson v. Shurling*, 162 Ga. 604, 134 S. E. 613.

The fact that the vendor had previously conveyed the land by warranty deed to one of the purchasers is not a compliance with the requirements of this section. *Holbrook v. Adams*, 166 Ga. 871, 872, 144 S. E. 657.

The property is not subject to levy and sale on a judgment for the secured debt until it has been reconveyed to the debtor, and until such reconveyance has been filed and recorded in the office of the clerk of the superior court. *Callaway v. Life Ins. Co.*, 166 Ga. 818, 144 S. E. 381.

Where the vendor of land executed a quitclaim deed thereto for the purpose of levying the execution which issued upon the judgment against the vendee for the unpaid purchase-money, such deed, filed and recorded before the levy, is not invalid for such purpose, although not recorded until after the death of the vendor. *Terrell v. Gould*, 168 Ga. 607, 148 S. E. 515.

It is not necessary that a quitclaim deed made for the purpose of levy and sale, under this section, should be delivered to the debtor. *Denton v. Hannah*, 12 Ga. App.

494(8), 77 S. E. 672; *Terrell v. Gould*, 168 Ga. 607, 148 S. E. 515.

VII. LEVY AND SALE.

General Considerations.—Under this section, the holder of a debt and of the legal title of land conveyed to him as security by the debtor, may, upon default in payment, reduce the debt to judgment, place of record a quitclaim re-investing the debtor with the legal title to the land, and thereupon have the land levied on and sold in satisfaction of the judgment, free from the claims of persons who purchased the land from the debtor subject to the security deed. *Scott v. Paisley*, 271 U. S. 632, 46 S. Ct. 591, affirming *S. C.* 158 Ga. 876, 124 S. E. 726.

Notice.—There is no principle entitling such purchasers to notice of the exercise of this statutory power by the creditor, and that in failing to provide such notice the statute does not deprive them of property without due process of law or deny them the equal protection of the laws. *Scott v. Paisley*, supra.

§ 6038. (§ 5433.) Where another than vendor, etc., has judgment.

In General—Scope—Applies to Stranger to Security Deed.—Where it appears that a conveyance of title to the property levied on, made by the defendant in execution to a stranger prior to the levy, would, if valid, operate, under the section to deprive the defendant in execution of any leviable interest in the property, the plaintiff in execution may, in the same action, for the purpose of subjecting the property to the execution, attack the conveyance upon the ground of fraud. This case is distinguishable from *Sloan v. Loftis*, 157 Ga. 93, 120 S. E. 781, in which it appears conclusively, as a matter of law, that the legal title was in the claimant, and that the only interest the defendant in execution had ever had in the property levied upon was as a purchaser holding under a bond for title. *Remington v. Garrett*, 34 Ga. App. 715, 130 S. E. 831.

No Levy Until Note Paid.—See *Miller v. First Nat. Bank*, 35 Ga. App. 334, 132 S. E. 783, holding the same as the paragraph under this catchline in the Georgia Code of 1926.

Cited in *Duke v. Ayers*, 163 Ga. 444, 454, 136 S. E. 410.

CHAPTER 2

Of Forthcoming Bonds

§ 6042. (§ 5437.) Rights of plaintiffs not affected.

Section quoted in *Garmany v. Loach*, 34 Ga. App. 722, 131 S. E. 108.

§ 6043. (§ 5438.) Measure of damages on forthcoming bond.

Applied in *Law v. Mullis*, 37 Ga. App. 329, 140 S. E. 430.

CHAPTER 4

Of the Satisfaction of Executions

§ 6048. Release of property subject to execution.—If the plaintiff in execution, for a valuable consideration, release property which is subject thereto, it is a satisfaction of such execution to the extent of the value of the property so released, so far as purchasers and creditors are concerned; but nothing in this section shall apply to any such release made by the transferee of any execution issued for taxes due the State of Georgia or any county or municipality therein, or of any execution issued by any municipality of this State on account of assessments made

against real estate for street or other improvements. In all such cases the fi. fa. shall be discharged or satisfied only to the extent of the amount of taxes or other assessments owing by the parcel released. Acts of 1929, p. 172, § 6048.

The language, "a valuable consideration," in this section, means a consideration "founded on money, or something convertible to money, or having a value in money, except marriage, which is a valuable consideration;" and such valuable consideration must flow to the plaintiff in execution. The principle embodied in this section is not applicable where the plaintiff in execution receives no benefit from a release, but a third person incidentally receives a benefit therefrom. *Saunders v. Citizens' First Nat. Bank*, 165 Ga. 558, 142 S. E. 127; 38 Ga. App. 141, 142 S. E. 744.

The evidence in this case demands a finding that the liens of the tax fi. fas. were satisfied relatively to the plaintiff's lot, on account of releases for values from the liens of the same fi. fas. on the other lots subject thereto by the transferee and holder of the fi. fas. in favor of grantees of said last-mentioned lots, who received deeds to their lots from plaintiff's grantor subsequently to plaintiff's deed to his separate lot. *Security Mortgage Co. v. Bailey*, 167 Ga. 119, 144 S. E. 899.

CHAPTER 5

Of Title by Judicial Sale

§ 6051. (§ 5446). Judicial sale passes title.

A sale regularly made by virtue of judicial process issuing from a court of competent jurisdiction conveys the title as effectually as if the sale were made by the person against whom the process issues; and the purchaser at such sale is ordinarily entitled to immediate possession, which he may obtain by writ of possession; but this is not his exclusive remedy. *Hill v. Kitchens*, 39 Ga. App. 789, 148 S. E. 754.

§ 6052. (§ 5447). Such title is original.

Applied in *Walton v. Sikes*, 165 Ga. 422, 426, 141 S. E. 188.

CHAPTER 6

Of Sales under Execution

ARTICLE 1

When and Where Made

§ 6060. (§ 5455.) Place, time, and manner of sales.

Not Applicable to Parties under Contract to Deliver.—The provisions of the section, relieving levying officers in certain instances from removing heavy property to the court-house door, were made for the benefit of the officers and the parties to processes levied by them, and not for the benefit of other persons who may voluntarily contract in writing by a statutory bond to deliver such property at the court-house door. See *Scruggs v. Bennett*, 34 Ga. App. 131, 132, 128 S. E. 703, and cases there cited.

ARTICLE 2

Advertisement of Judicial Sales

§ 6062. (§ 5457). Sales, how advertised.

An advertisement, which described the fi. fa. as being

in favor of the original plaintiff and against the defendant and stated their names, constituted a substantial compliance with this section, although at the time of the levy and of the advertisement the fi. fa. was owned by a transferee, who had acquired it by a written transfer, and who was not mentioned in the advertisement. *Hill v. Kitchens*, 39 Ga. App. 789, 148 S. E. 754.

§ 6065(a). Park's Code.

See § 6065(1).

§ 6065(1). Selection of official organ. — "No journal or newspaper published in this State shall be declared or made the official organ of any county for the publication of sheriff's sales, ordinary's citations, or any other advertising commonly known and termed 'official or legal advertising,' and required by law to be published in such county official newspaper, unless such newspaper shall have been continuously published and mailed to a list of bonafide subscribers for a period of two years, or is the direct successor of such journal or newspaper, and no change shall be made in official organship of any county except in those counties in which there is a city having a population of between 38,000 and 52,900 according to the official census of the United States for the year 1920, upon the action of the county commissioners or a majority of said officers, and in all other counties upon the concurrent action of the ordinary, sheriff, and clerk of the superior court of said county, or a majority of said officers: Provided, that in counties where no journal or newspaper has been established for two years the official organ may be designated by the ordinary, sheriff, and clerk of the superior court, a majority of these officers governing. Provided further, that in counties of this State having a population of not less than 11,370 and not more than 11,450, according to the United States Census of 1920 or any future census, the sheriff, ordinary, and the clerk of the superior court, or a majority of such officers, may select any newspaper published in any such county as the official organ of said county for publication of sheriff's sales, ordinary's citations, and any other advertising commonly known and termed 'official or legal advertising,' and required by law to be published in such county official newspaper." Acts 1929, p. 174, § 1.

§ 6065(2). When two or more journals published in certain counties.—Provided, that in all counties in the State of Georgia in which there is a city having a population of between six thousand eight hundred sixty (6860) and six thousand eight hundred eighty (6880) according to the official census of the United States of the year 1920, where there are published two or more journals or newspapers qualified under this section to be official organ of any county, then and in that event the said officers shall rotate every two years the official printing between said newspapers, provided said papers are published at the county site. Acts of 1929, p. 175, § 2.

ARTICLE 3

Sale of Perishable Property

§ 6068. (§ 5463.) Sale of perishable property.

As to amount of recovery, see note under section 5153.

Liens.—For a case holding substantially with the case under this catchline in the Georgia Code of 1926, see *Chambers v. Planters Bank*, 161 Ga. 535, 131 S. E. 280.

One Filing Intervention Charged with Notice of Application for Short-Order Sale.—One who files an intervention claiming title to a vehicle against which condemnation proceedings have been instituted for transporting prohibited liquors along the public highways is chargeable with notice of an application, already of file in the same court, for a "short-order" sale of the property under the section. *Parker v. State*, 36 Ga. App. 370, 136 S. E. 800.

Proceeds of Sale.—Where the personal property levied upon is afterwards regularly sold by virtue of a so-called short-order sale, obtained after the due advertisement and after the required notice to the defendant in execution, as provided in this and the following sections, the proceeds of the sale, less the costs, should be credited upon the indebtedness due by the defendant in execution. *Jones Motor Co. v. Macon Savings Bank*, 37 Ga. App. 767, 142 S. E. 199.

§ 6069. (§ 5464.) How sold.

See note to preceding section under catchline "Liens." Ed. Note.

It appearing that the required notice of intention to apply for an order for speedy sale of property under this section, was not given, and it not appearing that the case fell within either of the exceptions to that requirement provided in the section, the court was without jurisdiction to pass the order. *Parker & Dunn v. State*, 166 Ga. 256, 142 S. E. 879.

ARTICLE 4

Liability of Bidder at Public Sale

§ 6071. (§ 5466). Purchaser's liability.

Numerous decisions to the effect that the bidder takes the "risk" when he refuses to comply with his bid and lets the property be sold again, mean that he takes the chance of the property bringing more or less than he bid, thus eliminating or increasing his liability. *Womack v. Tidewell*, 38 Ga. App. 232, 234, 143 S. E. 620.

In *Morgan v. Wolpert*, 164 Ga. 462, 139 S. E. 15, it was held under the evidence that the acts of the sheriff amounted to an election by the sheriff to treat the sale as final, and preclude a resale under this section.

In *Peek v. Peek*, 166 Ga. 166, 142 S. E. 663, it is stated that: "It is at least questionable whether the executor or administrator could elect to resell after a delay of thirteen months at the instance of the purchaser."

TENTH TITLE

New Trials

CHAPTER 1

By Whom and for What Causes Allowed

§ 6080. (§ 5475). Rules nisi must be served.

Time of Service.—While no specific time is prescribed by this section within which the respondent shall be served with a copy of the rule nisi issued upon an application for a new trial, it has been held that service must be had a reasonable time before the hearing, and that such service is essential unless service be waived. *Peavy v. Peavy*, 167 Ga. 219, 221, 145 S. E. 55.

Motion in Writing.—Motions for new trial in municipal court of Atlanta required to be in writing, where principal sum sued for is above \$500. *Automobile Ins. Co. v. Watson*, 39 Ga. App. 244, 146 S. E. 922.

§ 6084. (§ 5479.) For erroneous charge to jury, etc.

Oral Charges.—The act of 1925 creating the municipal court of Macon, permitting oral charges to the jury is not unconstitutional because in conflict with this section. *Robinson v. Odom*, 168 Ga. 81, 147 S. E. 569.

Section cited in *May v. Yearly*, 34 Ga. App. 29, 128 S. E. 67; *Carr v. Hendrix*, 34 Ga. App. 446, 129 S. E. 876.

§ 6085. (§ 5480.) On account of new evidence.

Facts Known by Summoned Witnesses Who Did Not Testify.—Where witnesses summoned by the defendant are present at the trial but are not examined, a new trial will not be granted on the ground that since the verdict the defendant has for the first time learned that they could have testified to facts material to his defense. *Rounsaville v. State*, 163 Ga. 391, 397, 136 S. E. 276; *Hall v. State*, 117 Ga. 263, 43 S. E. 718.

Effect of Failure to Comply.—When the requirements of this section are not complied with, it is not error to overrule a ground of a motion for new trial based upon evidence alleged to be newly discovered, which might produce a different result should a new trial be granted. *Blackwell v. Houston County*, 168 Ga. 248, 147 S. E. 574.

§ 6086. (§ 5481.) Rule in such cases.

Discretion of Trial Judge.—That it is no abuse of discretion to refuse a new trial when the proper affidavits supporting witnesses are absent is reaffirmed in *Carpenter v. State*, 35 Ga. App. 349, 133 S. E. 350, and in *Nelson v. State*, 35 Ga. App. 364, 133 S. E. 351.

Affidavits—In Support of Witnesses.—An affidavit in support of the witness upon whose newly discovered evidence a new trial is sought must give the names of his associates, a statement that he keeps good company not being sufficient to meet this requirement, which is necessary to enable the prosecution to make a counter-showing; and where such affidavit does not comply with this requirement, the trial judge does not abuse his discretion by refusing to grant a new trial on this ground. *Brice v. State*, 34 Ga. App. 240, 129 S. E. 665, citing *Ivey v. State*, 154 Ga. 63, 113 S. E. 175. See also, *Carpenter v. State*, 35 Ga. App. 349, 133 S. E. 350; *Wright v. State*, 34 Ga. App. 505, 130 S. E. 216.

Affidavits.—See also, *Bryan v. Moncrief Furnace Co.*, 38 Ga. App. 107, 142 S. E. 700; *Thompson v. State*, 166 Ga. 512, 515, 143 S. E. 896; *Miller v. State*, 166 Ga. 698, 144 S. E. 254.

Disqualification of Juror.—The provision of this section that "if the newly discovered evidence is that of witnesses, affidavits as to their residence, associates, means of knowledge, character, and credibility must be adduced," does not apply where the purpose of the newly discovered evidence is to show disqualification of a juror as in this case; that section of the Code refers to witnesses whose evidence is to be used on the merits of the case if a new trial is had. *Cray v. State*, 37 Ga. App. 371, 140 S. E. 402.

Rule of Industrial Commission.—Rule 26 of the industrial commission follows this section, relating to newly discovered evidence as a ground for a new trial. *American Mutual Liability Ins. Co. v. Hardy*, 36 Ga. App. 487, 491, 137 S. E. 113.

Quoted in part in *Hewett v. State*, 36 Ga. App. 664, 137 S. E. 853.

Applied in *Shahan v. State*, 36 Ga. App. 315, 136 S. E. 798; *Trammell v. Shirley*, 38 Ga. App. 710, 145 S. E. 486; *Kingston v. State*, 38 Ga. App. 674, 145 S. E. 468.

Cited in dissenting opinion in *Bryan v. Moncrief Furnace Co.*, 168 Ga. 833, 836, 149 S. E. 193.

§ 6089. (§ 5484). Application for new trial.

The word "made" used in this section is synonymous with "filed." Therefore "it is essential to the validity of a motion for a new trial that it should be filed with the clerk of the trial court within the time prescribed by law; and a motion which has not been so filed should be dismissed, notwithstanding the judge before whom the case is tried may have granted a rule nisi during the term and within the time fixed by law for filing the motion." *Peavy v. Peavy*, 167 Ga. 219, 221, 145 S. E. 55.

Applied in *Northwestern Fire, etc., Ins. Co. v. Bank*, 38 Ga. App. 32, 142 S. E. 212.

§ 6090(a). Park's Code.

See § 6092(1).

§ 6092. (§ 5487). Motion made after adjournment of court.

Where before entry of the remittitur the defendant filed a so-called extraordinary motion for new trial, no ground of which met the requirements of law relating to such a motion, there was not error in overruling it. *Federal Investment Co. v. Ewing*, 166 Ga. 246, 142 S. E. 890.

§ 6092(1). Effect of failure to raise objections before trial judge.

Applied in *City Nat. Bank v. Bridges*, 34 Ga. App. 178, 128 S. E. 694; *Taunton v. Taylor*, 37 Ga. App. 695, 141 S. E. 511; *Heath v. Philpot*, 165 Ga. 844, 846, 142 S. E. 283.

§ 6093. (§ 5488.) Brief of evidence.

General Considerations.—The brief of evidence required is a condensed and succinct brief of material portions of oral testimony; the briefer the brief the better, provided it includes the substance of all the material portions of the evidence, oral and documentary. It is not dependent exclusively upon the stenographic report. The use of the question and answer form in the brief, except in unusual instances, is not permissible. *Brown v. State*, 163 Ga. 681, 137 S. E. 31.

Purpose Not to Review Judgment.—Although a case in this court is one in which it is not sought to review a judgment upon a motion for a new trial, yet what purports to be a brief of the evidence must be such a brief as is required by this section. *Cooper v. Harris*, 39 Ga. App. 607, 147 S. E. 805.

Sufficient Compliance.—In *Peek v. Irwin*, 164 Ga. 450, 139 S. E. 27, it is held that it can not be held that there was no bona fide effort to brief the evidence as required by this section. This case does not fall within the class of cases (a number of which are cited in the opinion) where the brief of the evidence was largely interspersed with colloquies between court and counsel, with statements of the stenographer, with the questions and answers of the witness thereto, and large masses of documentary evidence, consisting of affidavits, copy suits, deeds, letters, and other writings, much of which was irrelevant.

What Constitutes Non-Compliance.—Where the document purporting to be a brief of the evidence is made up of portions of the pleadings together with the captions of the same and other documentary evidence copied without briefing, and where many pages of the oral evidence are not briefed but are set out as questions and answers, such a paper will be held to constitute no compliance with the law. *Davis v. Gray*, 163 Ga. 271, 136 S. E. 81.

Same—Absence of Bona Fide Effort to Comply.—Where there had been no bona fide effort to comply with the requirement of this section, the court will not undertake to determine any question the decision of which is dependent upon a consideration of the so-called brief of evidence annexed to the bill of exceptions. *Clay v. Austell School Dist.*, 36 Ga. App. 354, 136 S. E. 540.

Applied in *Bennett v. Carter*, 168 Ga. 133, 147 S. E. 380; *Whitten v. Bacon*, 165 Ga. 151, 140 S. E. 287; *Richards v. Mabry*, 39 Ga. App. 707, 148 S. E. 289.

ELEVENTH TITLE

Supreme Court

CHAPTER 1

The Supreme Court and Its Powers

§ 6103. (§ 5498.) Powers enumerated.

Applied in *Hornady v. Goodman*, 167 Ga. 557, 146 S. E. 173; *Wilkes County v. Mayor and Council of Washington*, 167 Ga. 181, 145 S. E. 47; *Allen v. State*, 164 Ga. 669, 139 S. E. 415.

Cited in *Gore v. Humphries*, 163 Ga. 106, 115, 135 S. E. 481.

CHAPTER 2

Its Judges

§ 6116. Reversal and affirmance; number of judges.

Applied as to affirmance by operation of law when the justices are equally divided. *Irby v. Allen & Co.*, 161 Ga. 858, 131 S. E. 910.

CHAPTER 4

What Causes May Be Taken to the Supreme Court

§ 6138. (§ 5526.) Writ of error.

I. EDITOR'S NOTE.

For cases holding substantially with the rule of the first paragraph under this analysis line in the Georgia Code of 1926, see *American Agri. Chemical Co. v. Bank*, 34 Ga. App. 62, 128 S. E. 208; *Brown v. Marbut-Williams Lumber Co.*, 34 Ga. App. 348, 129 S. E. 575.

II. WHEN WRIT OF ERROR OR BILL OF EXCEPTIONS LIE.

A. Premature Jurisdiction Generally.

When Premature.—The direction of a verdict finding against a plea of *res adjudicata* is not such a final judgment as is subject to review by direct bill of exceptions. The ruling may be excepted to by exceptions *pendente lite*, upon which error may be assigned in a bill of exceptions containing an exception to a final judgment; but the error alleged to have been committed can not be reviewed in the Supreme Court until there has been a final judgment in the lower court. *Douglas v. Hardin*, 163 Ga. 643, 136 S. E. 793.

A motion to continue a cause is not a final judgment within the meaning of this section. *Stedham v. Farmers' State Bank*, 37 Ga. App. 605, 141 S. E. 90.

The striking of a plea in abatement is not a "final" judgment within the meaning of this section. *Futch v. State*, 37 Ga. App. 151, 139 S. E. 110.

Order Rescinding Temporary Injunction.—Though a writ of error will lie to an order granting or denying an injunction, it will not lie to an order rescinding a previous temporary restraining order. Such an order is not a final adjudication of the case, and the writ of error sued out to review the same is premature and must be dismissed under the provisions of section 6138 of the Civil Code. *James v. Wilkerson*, 164 Ga. 149, 138 S. E. 71.

Writ of error does not lie on dissolution of temporary restraining order, not expressly refusing injunction. *Goss v. Brannon*, 165 Ga. 502, 141 S. E. 295.

Refusal to set aside order making a party, and to strike his answer, no basis for writ of error. *Vanzant v. First National Bank*, 164 Ga. 772, 139 S. E. 537.

Recommittal to an auditor of a case which he reports that he has dismissed is no final judgment on which a writ of error lies. *Herrington v. Baird*, 164 Ga. 332, 138 S. E. 774.

Refusal of Amendment.—Final judgment as basis of writ of error, not rendered by refusal of amendment in pending suit for injunction. *Ivey v. Forsyth*, 164 Ga. 705, 139 S. E. 354.

Refusal to make new parties was interlocutory order on which writ of error did not lie. *Jackson v. Fite*, 165 Ga. 382, 140 S. E. 754.

Striking Plea of Former Jeopardy.—Until there has been a judgment finally disposing of the case in the trial court, the Supreme Court has no jurisdiction to pass upon an assignment of error complaining of the striking of a plea of former jeopardy, filed by the accused. *Vaughn v. State*, 38 Ga. App. 438, 144 S. E. 223.

B. Demurrers.

A writ of error lies upon the overruling of a general demurrer to the petition, as a judgment sustaining the demurrer would have finally disposed of the case. *Continental Trust Co. v. Sabine Basket Co.*, 165 Ga. 591, 141 S. E. 664; *Magid v. Byrd*, 164 Ga. 609, 612, 139 S. E. 51.

The judgment complained of did not purport to dismiss the petition in the pending action. In this respect the

case differs from Rabun Mineral & Development Co. v. Heyward, 163 Ga. 398, 136 S. E. 272, and Newton v. Roberts, 163 Ga. 135, 135 S. E. 505. The judgment complained of was not the refusal of an injunction, nor, if it had been rendered as claimed by the plaintiff in error, would it have been a final disposition of the cause, or final as to any material party. Accordingly the writ of error is premature and can not be entertained. Ivey v. Forsyth, 164 Ga. 705, 139 S. E. 354.

Properly construed, the order of the judge in passing on the demurrer is an interlocutory order, and is not a final judgment in the case; and therefore, under this section 6138, the bill of exceptions must be dismissed as prematurely brought. Stephens v. Haugwitz, 167 Ga. 352, 145 S. E. 660.

An order overruling a demurrer to an affidavit of illegality is such a final judgment as will support a writ of error therefrom. Miles v. Swift, 38 Ga. App. 42, 142 S. E. 472.

Applied in Leavitt v. Hunnicutt, 168 Ga. 788, 149 S. E. 139; Hawkins v. Hawkins, 166 Ga. 153, 154, 142 S. E. 684; Alumbaugh v. State, 39 Ga. App. 559, 567, 147 S. E. 714.

C. Other Instances of Final Disposition.

Judgment on General Demurrer.—A judgment overruling the general demurrer to a petition, is a final determination of the case and would authorize the defendant to assign error thereon in a direct bill of exceptions. Newton v. Roberts, 163 Ga. 135, 135 S. E. 505.

A judgment overruling a motion for new trial, after verdict, is a final judgment on which a writ of error lies, although no judgment on the verdict has been entered. Alred v. Alred, 164 Ga. 186, 137 S. E. 823.

Order for Making New Party.—An order for making a new party is a final disposition of the cause as to such new party if the trial court refuses to make him a party, and consequently a writ of error sued out by him cannot be said to have been prematurely obtained. McMillan v. Spencer, 162 Ga. 659, 134 S. E. 921.

Applied in Seaboard Air Line R. Co. v. Sarman, 36 Ga. App. 448, 136 S. E. 920; Cooper v. Whitehead, 163 Ga. 662, 136 S. E. 911.

§ 6139. (§ 5527.) Bills of exceptions; cross-bills.

See annotation to section 6224.

II. BILLS OF EXCEPTION

A. Assignment of Error Generally

The bill of exceptions sued out by the superintendent of banks in this case, though denominated therein as a cross-bill of exceptions, is a main bill of exceptions assigning error upon the final judgment of the court below; and it was not erroneous for the Court of Appeals, in affirming the judgment sought to be reviewed by the plaintiff in certiorari in her bill of exceptions, to reverse the judgment complained of in the bill of exceptions filed by the superintendent of banks. Latimer v. Bennett, 167 Ga. 811, 146 S. E. 762.

Applied in Thompson v. Savannah Band & Trust Co., 39 Ga. App. 809, 148 S. E. 621.

III. CROSS-BILLS.

General Considerations.—Calhoun Oil, etc., Co. v. Western, etc., Railroad, 35 Ga. App. 436, 133 S. E. 348, affirms the holding of the second sentence under this catchline in the Georgia Code of 1926.

§ 6139(a). Park's Code.

See § 6139(1).

§ 6139(1). Exceptions pendente lite.

In an action filed under section 5088, it was held that the mere fact that a copy of the exceptions pendente lite appears in the transcript of the record is not a compliance with the final bill of exceptions does not contain an assignment of error either upon the exceptions pendente lite or upon the ruling therein complained of. House v. American Discount Co., 31 Ga. App. 396, 120 S. E. 701; Carter v. Vanlandingham, 37 Ga. App. 642, 141 S. E. 429.

There being no assignment in the final bill of exceptions either upon the exceptions pendente lite or upon

the rulings excepted to therein, no question is presented for decision under the exceptions pendente lite. Alexander v. Chispstead, 152 Ga. 851, 111 S. E. 552; House v. American Discount Co., 31 Ga. App. 396, 120 S. E. 701; Atlanta Life Ins. Co. v. Jackson, 34 Ga. App. 555, 130 S. E. 378; Carter v. Vanlandingham, 37 Ga. App. 642, 141 S. E. 429; Hicks v. Brown Estate, 38 Ga. App. 659, 145 S. E. 99.

CHAPTER 5

Of Taking Cases to Supreme Court

ARTICLE 1

Mode of Procedure

§ 6140. (§ 5528). Mode of taking cases to Supreme Court by bill of exceptions.

It will be noted that under this section, taken from the act of 1889, it is not only required that the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, but he must primarily assert that the judgment rendered was error and injurious to his cause. He must except to it. Beall v. Mineral. Tone, Co., 167 Ga. 667, 669, 146 S. E. 473.

§ 6144. When motion for new trial, etc., not necessary.

Cited in Home Ins. Co. v. Swann, 34 Ga. App. 19, 128 S. E. 70.

§ 6147. (§ 5534.) Judge to examine certificate.

Section Will Not Prevent Dismissal of Improperly Certified Certificate.—The judge's certificate to the bill of exceptions must state that it is true; and for lack of such certification the bill of exceptions will be dismissed. This is not a mere "want of technical conformity to the statutes or rules regulating the practice in carrying cases to" the Supreme Court; and this section will not prevent the dismissal of the bill of exceptions for the lack of such certification. Cady v. Cady, 161 Ga. 556, 131 S. E. 282.

ARTICLE 2

Diminution of Record

§ 6149. (§ 5536.) Additional record, how procured.

In General.—It appearing from the record that the petition for supplementation of the brief of evidence in this case was presented to the trial judge within twenty days after service of the bill of exceptions was acknowledged by counsel for the defendant in error, and it further appearing from the court's order directing that the fire-insurance policy declared upon and the other policy be sent to this court, that these documents are "true copies of the documents introduced in evidence in the trial of the case and filed therein, and are material to a clear understanding of the errors complained of," the contracts of insurance are properly before this court, under this section and will be considered as a part of the record in the case. Hall v. Continental Ins. Co., 38 Ga. App. 814, 145 S. E. 891.

While this court may, under this section require the clerk of the court below to certify and send up any portion of the record of the case in that court which has not been brought up, and which, in the opinion of this court, is necessary to be before it in order to adjudicate fully and fairly the questions at issue and the alleged errors, and while this court may, under section 6151 when the incompleteness of the record in a material point

is suggested upon the oath of a party or his counsel, consider as a part of the record the admission in writing of the opposite party as to the existence and effect of the omitted part, these provisions of the statute have reference only to the record actually made and existing in the court below. *Powell v. Griffith*, 38 Ga. App. 40, 142 S. E. 466.

Additional record not ordered up, in view of non-authentication of evidence. *Federal Investment Co. v. Ewing*, 165 Ga. 435, 436, 141 S. E. 65.

What May Be Brought up.—For a case holding with the principle set out under this catchline in the Georgia Code of 1926, see *Free Gift Lodge v. Edwards*, 161 Ga. 832, 132 S. E. 206.

Applied in *Lewis v. Moultrie Banking Co.*, 36 Ga. App. 347, 351, 136 S. E. 554.

§ 6151. Diminution of record.

Where a motion to dismiss informs the appellate court of the existence of material parts of the record not specified in the bill of exceptions, it is incumbent upon this court to have the clerk of the trial court transmit to it copies of the same unless the existence and legal effect of the omitted portions of the record are admitted in writing by the opposite party, in which case this court can consider them as a part of the record without having them sent up. *Vandiver v. Georgia Ry., etc., Co.*, 38 Ga. App. 59, 60, 143 S. E. 455.

Delay Not Authorized.—The law embodied in this section does not in any case authorize delay in tendering to a trial judge a bill of exceptions alleging error in a judgment rendered during a given term, for more than thirty days after the final adjournment of the court for that term. *Blumenfeld v. Freeman*, 38 Ga. App. 694, 145 S. E. 495.

Applied in *Zachry v. Peoples Bank*, 168 Ga. 469, 148 S. E. 165; *Ward v. Parks*, 166 Ga. 149, 150, 142 S. E. 690; *Kumpe v. Hudgins*, 39 Ga. App. 788, 149 S. E. 56.

ARTICLE 3

Bills of Exceptions, When to Be Signed

§ 6152. (§ 5539.) Bill of exceptions, when to be tendered.

General Considerations—Failure to Certify for More than Thirty Days.—This section does not in any case authorize delay in tendering a bill of exceptions for more than thirty days after the final adjournment of the court for that term. *Birmingham Finance Co. v. Chisholm*, 162 Ga. 501, 134 S. E. 301.

Delay or Extension of Time.—*Cohen v. Brown*, 35 Ga. App. 508, 134 S. E. 119, affirms the holding given in the first paragraph under this catchline in the Georgia Code of 1926. *Burnett v. McDaniel & Co.*, 35 Ga. App. 367, 133 S. E. 268, holds substantially the same as the second paragraph under this catchline in the Georgia Code of 1926.

Same—Supersedeas Does Not Extend.—The fact that the order of the superior court to which exception is taken provides that it shall operate as a supersedeas for twenty days relates merely to the enforcement of the judgment pending a valid writ of error, and did not have the effect of changing the date of the order excepted to, or of extending the time prescribed by law within which an appeal could be taken. *Cohen v. Brown*, 35 Ga. App. 508, 134 S. E. 119.

Applied in *Parrish v. Central, etc., R. Co.*, 36 Ga. App. 133, 135 S. E. 762; *Forrester v. Frizzell*, 35 Ga. App. 562, 134 S. E. 182; *Hamilton v. Kinnebrew*, 161 Ga. 495, 131 S. E. 470; *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547.

Cited in *Miller & Co. v. Gibbs*, 161 Ga. 698, 699, 132 S. E. 626.

§ 6153. (§ 5540.) Fast bills of exception.

See notes to § 6138.

Cited in *Miller & Co. v. Gibbs*, 161 Ga. 698, 132 S. E. 626.

§ 6154. (§ 5541.) Exceptions pendente lite.

Applied to cross bill of exceptions to review interlocutory hearings to which no exception was filed within time prescribed. *Miller & Co. v. Gibbs*, 161 Ga. 698, 132 S. E. 626.

ARTICLE 4

Proceedings in Case of Death or Refusal to Sign

§ 6155. (§ 5542.) When the judge is dead or absent.

Failure to Tender to Judge.—The provisions of the section are not applicable where a so-called bill of exceptions was not certified by the judge of the trial court, but was verified by the oath of the attorney for the plaintiff in error, and where it appears that the bill of exceptions was never tendered to the presiding judge for certification although the judge lived for more than ninety days after the adjournment of the term of the court during which the judgment complained of was rendered, and was capable of acting and could have certified the bill had it been presented to him in time. *Linthicum v. Trust Co.*, 36 Ga. App. 423, 136 S. E. 813.

§ 6158. (§ 5545.) Judge refusing to certify.

Applied in *Nash v. Sheppard*, 161 Ga. 192, 129 S. E. 639.

§ 6159. (§ 5546.) Judge failing to sign, how compelled.

Conflict with Rules of Court.—The rules of the Supreme Court and of the Court of Appeals (§§ 6252, 6343), in so far as they fix a twenty-day limit for filing an application for mandamus nisi on refusal of a trial judge to certify a bill of exceptions, are in conflict with this section, and must yield thereto. *Brown v. Hutcheson*, 167 Ga. 451, 146 S. E. 27. See also, *Brown v. Hutcheson*, 39 Ga. App. 99, 146 S. E. 329.

Applied in *Brown v. Hutcheson*, 166 Ga. 644, 144 S. E. 17.

ARTICLE 5

Service of Bills of Exceptions

§ 6160. (§ 5547.) Service of copy on defendants.

A party in the trial court, who is interested in sustaining the verdict and the judgment refusing a new trial, is an indispensable defendant in error; and failure make him a party to the bill of exceptions, and to serve him therewith or to obtain an acknowledgment of service with consent that the case be heard in the Supreme Court, is ground to dismiss the writ of error on motion. *Rowe v. Mobley*, 166 Ga. 726, 144 S. E. 211.

Where an affidavit appears upon its face to have been executed on January 31, 1927, after the certification of a bill of exceptions on January 14, 1927, and the affidavit recites indefinitely that after the certification of the bill of exceptions the deponent delivered a copy of it to a named attorney (who, it appears from the record, was counsel for the opposite party in the trial court), and that that attorney signed an acknowledgment of service and a waiver of further notice or service, and where there is nothing in the affidavit to indicate the dates of these transactions, except that they occurred between the date of the certification of the bill of exceptions and the date of the execution of the affidavit, the affidavit is insufficient to show that service of the bill of exceptions was perfected within ten days after the date of its certification, as required under this section. *Tisinger v. Ellerbe*, 37 Ga. App. 391, 140 S. E. 522.

Applied in *Bussell v. Savannah Guano Co.*, 39 Ga. App. 613, 147 S. E. 914.

§ 6160(1). Parties bound by service on counsel; waiver of defects.

General Considerations—Absence of Service or Acknowledgment.—Where there is no service and no acknowledgment of service or waiver thereof, the bill of exceptions will be dismissed. *Izlar v. Central, etc., R. Co.*, 162 Ga. 558, 134 S. E. 315.

This and the following section are remedial, and to be

liberally construed. *Anderson v. Haas*, 160 Ga. 420(2), 128 S. E. 178. The acknowledgment of service of the bill of exceptions having been signed by counsel for the tax-collector, he is bound thereby; and by this section he can be made a party defendant, although not named as such in the bill of exceptions. So the motion to dismiss the bill of exceptions is denied, and an order will be entered making the tax-collector a party defendant in error. *Bennett v. Wilkes County*, 164 Ga. 790, 792, 139 S. E. 566.

Parties Bound by Service upon Counsel—Non-residents of County.—Where it is attempted to serve a bill of exceptions by leaving a copy thereof at the residence of the attorney of the defendant in error, it must affirmatively appear that the defendant in error is a non-resident of the county. *Saunders v. Saunders*, 163 Ga. 770, 137 S. E. 15.

Sufficiency of Acknowledgment to Bind in Dual Capacity.—Where an acknowledgment of service by "Atty. for X" has been procured, X is bound both personally and in his representative capacity, and the bill of exceptions can be amended in the Supreme Court by making any person a party defendant in error to the case who is bound by such service, although such person may not have been named in the bill of exceptions. *Henderson v. Lott*, 163 Ga. 326, 328, 136 S. E. 403.

Acknowledgment as Waiver—Service on Sunday.—The Court of Appeals will not dismiss the bill of exceptions merely because the service thereof appears to have been acknowledged on a date which the court judicially knows was Sunday, when counsel did not state in the entry of acknowledgment that it was not to be construed as a waiver of the defect. *Bartow v. Smith*, 35 Ga. App. 57, 132 S. E. 103.

Defendants Designated by Et Al.—Where (although service be acknowledged by the attorney for "defendants in error") the bill of exceptions designates but one defendant in error by name, referring to the other or others by the words "et al.," the writ of error will be dismissed in the absence of an offer to amend. *Adair v. Bradford*, 165 Ga. 288, 140 S. E. 878; *McEachin v. Jones*, 165 Ga. 403, 140 S. E. 878.

Applied in *Bussell v. Savannah Guano Co.*, 39 Ga. App. 613, 147 S. E. 914; *Daniels v. Avery*, 167 Ga. 54, 145 S. E. 45; *Bennett v. Wilkes County*, 164 Ga. 790, 139 S. E. 566; *King v. Casey*, 164 Ga. 117, 119, 137 S. E. 776; *Newton v. Oglesby*, 39 Ga. App. 704, 148 S. E. 347; *Sanders v. Sanders*, 163 Ga. 770, 137 S. E. 15.

§ 6160(2). Bill of exceptions amended to make person a party defendant.

Applied in *Sanders v. Sanders*, 163 Ga. 770, 137 S. E. 15; *Henderson v. Lott*, 163 Ga. 326, 328, 136 S. E. 403. See note under preceding section.

Applied also in *Muller v. Cooper*, 165 Ga. 439, 440, 141 S. E. 300.

§§ 6164(a), 6164(b). Park's Code.

See §§ 6160(1), 6160(2).

ARTICLE 6

Supersedeas

§ 6165. (§ 5552.) Supersedeas, how obtained.

Applied in *Tift v. Atlantic Coast Line R. Co.*, 161 Ga. 432, 447, 131 S. E. 46; *Autry v. Southern Railway Co.*, 167 Ga. 136, 140, 144 S. E. 741.

ARTICLE 7

Duty of Clerks of Superior and City Courts

§ 6167. (§ 5554.) Filing in clerk's office.

Sufficient Filing.—For cases sustaining the principle stated in the second sentence under this catchline in the Georgia Code of 1926, see *Gibbs v. Hancock Mut. Life Ins. Co.*, 35 Ga. App. 505, 133 S. E. 749; *Norris v. Baker County*, 135 Ga.

229, 69 S. E. 106; *Goodin v. Mills*, 137 Ga. 282, 73 S. E. 399; *Tatum v. Trappnell*, 30 Ga. App. 104, 117 S. E. 251.

Effect of Non-Compliance.—Where it appears from the certificate of the clerk of the trial court that the section was not complied with, and that counsel for plaintiff in error was the cause of such failure, the writ of error must be dismissed. *Atlanta, etc., Nat. Bank v. Goodwin*, 34 Ga. App. 169, 128 S. E. 691.

A bill filed on the sixteenth day after its certification, and not within the fifteen days required by this section must be dismissed. *Jenkins v. Crockett*, 164 Ga. 391, 138 S. E. 787.

Applied in *Fields v. The State*, 39 Ga. App. 644, 148 S. E. 170.

Cited in *Alford v. Gibson*, 161 Ga. 567, 131 S. E. 529.

CHAPTER 6

In the Supreme Court

ARTICLE 3

Making Parties, etc.

§ 6176. (§ 5562.) Essential parties.

Instances of Essential Parties—Use May Be Essential Party.—There may be cases in which the nominal plaintiff is so wholly without interest in the suit, or the results thereof, as to make the use of the proper person upon whom to perfect any service required to be made in behalf of the defendant. *Sligh v. Smith*, 36 Ga. App. 237, 239, 136 S. E. 175.

An administrator who sought interpleader and direction had no right to except to decree, all other parties being satisfied with it. *Bryan v. Rowland*, 166 Ga. 719, 722, 144 S. E. 275.

Applied in *Whitehurst v. Holly*, 162 Ga. 323, 133 S. E. 861.

ARTICLE 4

No Dismissals in Supreme Court, When

§ 6183. (§ 5569.) Unlawful to dismiss for technical defect.

Maps.—Assignment of error on admission of map in evidence over objection held sufficient. *Kearce v. Maloy*, 166 Ga. 89, 142 S. E. 271.

An assignment of error upon a judgment sustaining a demurrer to the petition, in this language, "to which ruling plaintiff excepted, excepts now, and assigns the same as error, on the ground that the petition as amended did set forth a cause of action," is sufficient to present the real issue; and the writ of error will not be dismissed because the assignment of error is insufficient. *Thomas v. Lester*, 166 Ga. 274, 142 S. E. 870.

Applied in *Colquitt County v. Bahnsen*, 162 Ga. 340, 341, 345, 133 S. E. 871; *Stephens v. Liquid Carbonic Co.*, 36 Ga. App. 363, 367, 136 S. E. 808.

Cited in *Flood v. Empire Invest. Co.*, 35 Ga. App. 266, 133 S. E. 60.

§ 6184. (§ 5570.) Dismissal avoided by amendment.

Amending to Conform to Judgment.—The plaintiff in error should be allowed to amend the bill of exceptions so as to make it conform with technical accuracy to the judgment. *Flood v. Empire Invest. Co.*, 35 Ga. App. 266, 268, 133 S. E. 60.

Adding Brief of Evidence.—The bill of exceptions is amendable by adding to the specification of material parts of the record the brief of evidence approved by the trial judge and ordered filed as part of the record. *Kimsey v. Rogers*, 166 Ga. 176, 142 S. E. 667; *Simmerson v. Herringdine*, 166 Ga. 143, 142 S. E. 687.

Applied in *Hughes v. The State*, 39 Ga. App. 834, 148 S. E. 756.

§ 6186. (§ 5572.) Benefits lost by negligence.

Applied in *Barrett v. Union Banking Co.*, 163 Ga. 893, 137 S. E. 14.

§ 6187. No dismissal because not certified in time.

Applied in *Parrish v. Central, etc., R. Co.*, 36 Ga. App. 133, 135 S. E. 762.

ARTICLE 5

Amendments

§ 6190. (§ 5575.) Incomplete record, how corrected.

Where a demurrer is not sent up as a part of record, the Supreme Court is empowered under this section to require it sent up. *Bennett v. Benton*, 162 Ga. 139, 140, 133 S. E. 855.

ARTICLE 7

Decisions

§ 6204. (§ 5585.) First grant of a new trial.

Where **First New Trial Error**.—It is error even to grant a first new trial where the law and the evidence demands the verdict as rendered, whether it was directed by the court or returned at the volition of a jury. *Jones Motor Co. v. Finch Motor Co.*, 34 Ga. App. 399, 401, 129 S. E. 915.

Applied in *Riggins v. Scott*, 35 Ga. App. 465, 133 S. E. 647; *Louisville & N. R. Co. v. Barksdale*, 34 Ga. App. 812, 131 S. E. 298; *Nabros v. Nabros*, 161 Ga. 382, 131 S. E. 45. See *Douglas v. Hardin*, 161 Ga. 838, 131 S. E. 896; *Gunn v. Chapman*, 166 Ga. 279, 142 S. E. 873; *Howell v. Booth*, 39 Ga. App. 41, 145 S. E. 910; *Dodgen v. Fowler*, 39 Ga. App. 515, 147 S. E. 775; *National Union Fire Ins. Co. v. Ozburn*, 38 Ga. App. 276, 143 S. E. 623; *Brooks v. Jack-ins*, 38 Ga. App. 57, 142 S. E. 574; *Belcher v. Land*, 37 Ga. App. 346, 140 S. E. 423.

Cited in *Whitworth v. Carter*, 39 Ga. App. 625, 630, 147 S. E. 904.

§ 6207. (§ 5588.) Decision of, how reversed.

Applied in *Hallman v. Atlanta Child's Home*, 161 Ga. 247, 254, 130 S. E. 814.

Cited in *Central of Georgia Ry. Co. v. Wright*, 165 Ga. 1, 42, 139 S. E. 890.

ARTICLE 8

Record and Costs

§ 6210. (§ 5591.) Attorney liable for costs.

Advance of Costs by Attorney Does Not Defeat Levy.—A levy under an execution for costs, issued in the name of the plaintiff for the use of officers of court, is not subject to be arrested by affidavit of illegality on account of the fact that the attorney for the plaintiff had advanced the costs incurred in the appellate court. *Harvey v. Long Cigar, etc., Co.*, 36 Ga. App. 45, 135 S. E. 222.

ARTICLE 9

Judgment and Remittitur

§ 6213. (§ 5594.) Damages in cases of affirmation.

Court Not Convinced That Case for Delay.—See *Guthrie v. Rowan*, 34 Ga. App. 671, 131 S. E. 93, holding the same as the paragraph under this catchline in the Georgia Code of 1926.

Must Be Judgment for Sum Certain.—See *Clark v. Union School District*, 36 Ga. App. 80, 135 S. E. 318, holding substantially the same as the first sentence under this catchline in the Georgia Code of 1926.

When Is Case Brought Up for Delay—Objection That Verdict Contrary to Law and Evidence.—Where the only ground of exception presented was that the verdict is contrary to law and without evidence to support it, and where it appears that under a proper application of the law the evidence supports the verdict this section will be applied. *Yeomans v. Beasley*, 36 Ga. App. 467, 137 S. E. 131.

Applied in *Felker v. Still*, 35 Ga. App. 236, 133 S. E. 519; *Todd-Worsham Auction Co. v. Underwood*, 38 Ga. App. 792, 145 S. E. 889; *Sheffield v. Sheffield*, 38 Ga. App. 685, 145 S. E. 672.

§ 6217. (§ 5598.) Judgment affirmed, execution at once.

See notes to § 4336.

RULES OF THE SUPREME COURT OF THE STATE OF GEORGIA

II. Bills of Exceptions and Records

§ 6224. (§ 5605.) Rule 6. Bills of exceptions.

Bill Held Sufficient.—See *Colquitt County v. Bahnsen*, 162 Ga. 340, 345, 133 S. E. 871, where the bill of exceptions was held to specify plainly the decision of the court denying the plaintiff a mandamus absolute.

IV. Costs

§ 6232. (§ 5613.) Rule 14. Attorneys, etc., bound.

Appointed Counsel Not Relieved of Payment.—Under this rule of court the counsel can not be relieved from the payment of costs on the ground that he was appointed in the court below to represent the defendant, the latter being unable to employ counsel, and being financially unable to respond to him for the costs incurred. *James v. State*, 162 Ga. 42, 132 S. E. 417.

IX. Dockets and Call of Cases

§ 6249. (§ 5621.) Rule 30. Want of prosecution.

Applied in *Phillips v. Blackwell*, 166 Ga. 737, 144 S. E. 319.

XI. Mandamus

§ 6252. (§ 5623.) Rule 33. Application for, when made.

See notes to § 6159.

Applied in *Brown v. Hutcheson*, 166 Ga. 644, 144 S. E. 17; 38 Ga. App. 453, 144 S. E. 147.

RULES OF THE SUPERIOR COURTS AS AMENDED IN 1924.

COMMON-LAW RULES

II. Attorneys.

§ 6261. (§ 5634.) Rule 2. Arguments. — Arguments of counsel shall be confined to the law and the facts involved in the case then before the court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the court, and questions of fact to the jury. Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto, in decisions by the Supreme Court or Court of Appeals.

§ 6263. (§ 5636.) Rule 4. Papers. — Attorneys receiving papers from the clerk under order of the court, as provided by Rule 17, shall in all cases receipt for the same and return the same on or before the call of the case for trial; and after the trial of a case it shall be the duty of attorneys to return all the papers connected therewith to the clerk; otherwise he or they shall be considered in contempt of court.

§ 6264. (§ 5637.) Rule 5. Number of speeches and time for argument.—Not more than two counsel shall be permitted to argue any case for each side except by express leave of the court; and in no case shall more than one counsel be heard in conclusion.

In all cases, civil, criminal and equitable, except capital cases, argument shall be limited to thirty minutes to the side, which may in the discretion of the judge be extended upon application before the argument begins. In capital cases argument shall be limited to two hours to the side, which may be extended by the judge upon statement of counsel in his place that he cannot do justice to the case in the time allowed.

§ 6264(d). Park's Code.

See P. C. § 1055(4).

VI. Consent

§ 6278. (§ 5651). Rule 19. What consent enforced.

An oral agreement is not necessarily excluded by the provisions of this section; on the other hand, an agreement between attorneys, acting within the scope of their authority, will be binding even though it is not in writing, where it is not denied by the opposite party and where, as here, it appears to have been executed to the detriment of the party invoking it. While the agreement relied on in this case was not in writing and while there may be a difference between counsel as to the construction to be placed upon the words which passed between them, there is in reality no dispute as to what was said. *Oliver v. Godley*, 38 Ga. App. 66, 69, 142 S. E. 566.

VII. Continuances.

§ 6280. (§ 5653.) Rule 21. Three minutes. — When a case is sounded for trial, the parties shall immediately announce ready, or move to continue; if three minutes should elapse before the announcement or motion to continue, the plaintiff's case will be dismissed, or the defendant's plea stricken. No argument, without express leave of the court, shall be heard on a motion to continue.

XII. Illegality

§ 6288. (§ 5662.) Rule 29. No second affidavit.

General Considerations — When First Affidavit Void. — This section has no application where the first affidavit of illegality was void. *Bridges v. Melton*, 34 Ga. App. 480, 129 S. E. 913.

The fact that the first affidavit was dismissed, without a trial of the issues raised or attempted to be raised by it, does not make an exception to the rule. *Elders v. Beasley*, 167 Ga. 122, 123, 144 S. E. 909; *Anderson v. Georgia State Bank*, 38 Ga. App. 225, 43 S. E. 461.

XIII. Interrogatories

§ 6291. (§ 5665.) Rule 32. Time allowed for return.—The time to be allowed for the return of commissions from any part of the United States of North America, if less than one hundred miles distant from the place of trial, shall be ten days; if a greater distance, twenty days; to any part of the West Indies or South America, forty days; or to any part of Europe, fifty days, unless, in the discretion of the court, a longer time shall be allowed.

XIV. Judgment

§ 6296(a). Rule 37 (a). Form of decree of court in total divorce cases.—Two concurring verdicts favoring a total divorce to plaintiff having been rendered in the within case, it is considered, ordered and adjudged that said marriage be, and the same is hereby annulled and a total divorce granted between the parties with liberty to the plaintiff to marry again. The defendant shall be at liberty to marry again.

Ordered further that the defendant pay the cost of these proceedings.

This day of 19...

Judge Superior Courts Circuit.

XXVI. Writ of Error

§ 6318(a). Rule 60. Bill of exceptions in misdemeanor case.—That upon the filing of a bill of exceptions in a misdemeanor case, counsel for plaintiff-in-error be required to certify that he verily believes that his client has good grounds for reversal, and that upon an examination of the whole record, he does, in good faith, appeal said case.

RULES OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

VII. Mandamus

§ 6348. Rule 24. Application for, when made.

See notes to § 6159.

In General.—An application for a mandamus nisi to compel a judge to certify a bill of exceptions must be filed within twenty days after the refusal of the judge to certify the bill of exceptions; and if not so filed, the petition will not be considered. *Brown v. Hutcheson*, 33 Ga. App. 453, 144 S. E. 147.

Applied in *Brown v. Hutcheson*, 166 Ga. 644, 144 S. E. 17.

CONSTITUTION OF THE STATE OF GEORGIA

ARTICLE 1

Bills of Rights

SECTION 1

Rights of the Citizen

§ 6358. (§ 5699). Par. 2. Protection the duty of government.

See notes to § 1551(99).

§ 6359. (§ 5700.) Par. 3. Life, liberty, and property.

See annotations to §§ 5206, 6700.

See notes to § 4261, and P. C. 211(28).

Right to Hearing—Condemnation Law.—The provisions of the act of the General Assembly to amend the charter of Edison, approved August 4, 1923, relating to the condemnation of land for school purposes, the proceedings for condemnation, and the notice to be given to the owners of property sought to be condemned, are not in violation of this section inasmuch as the act provides for a hearing before assessors duly appointed after notice, in the same manner and under the same regulations as are contained in the general law for condemnation of private property. *Sheppard v. Edison*, 161 Ga. 907, 132 S. E. 218.

Same—Tax Law. — If the act of the General Assembly furnishes the taxpayers notice and hearing before the act becomes operative, there is no lack of due process. The taxpayers are presumed to qualify, to inform themselves as to the merits of the proposed issues, and to exercise their rights as voters in all elections submitted to them. Where they have this opportunity, there is no lack of "due process of law" which would nullify proposed legislation. *Green v. Atlanta*, 162 Ga. 641, 648, 135 S. E. 84.

Zoning Ordinance which deprives a person of the lawful use of his property held unconstitutional, under this section. *Morrow v. Atlanta*, 162 Ga. 228, 133 S. E. 345.

Instances Where Section Not Violated.—The automobile law of 1915 is not invalid under this section. *Lee v. State*, 163 Ga. 239, 135 S. E. 912.

Expenditure of municipal funds for special services rendered in tax valuation, does not deprive citizens of property without due process of law. *Tietjen v. Savannah*, 161 Ga. 125, 126, 129 S. E. 653.

Section 125 of the Penal Code is not unconstitutional as violative of this section. *Rhoden v. State*, 161 Ga. 73, 129 S. E. 640.

Same—Ordinances.—Ordinances making a tax assessment

for street improvement, a lien upon the property, is not violative of this section. *Baugh v. LaGrange*, 161 Ga. 80, 130 S. E. 69.

The amendment of the charter of the City of Atlanta, enacted by the General Assembly in 1925, does not contravene the due-process clause of the State constitution. *Etheridge v. Atlanta*, 167 Ga. 222, 145 S. E. 84.

A municipal ordinance prohibiting public billiard and poolrooms, is not repugnant to this section. *Shaver v. Martin*, 166 Ga. 424, 143 S. E. 402.

§ 6360. (§ 5701). Par. 4. Right to the courts.

Applied in *Boone v. Lord*, 38 Ga. App. 397, 144 S. E. 123.

§ 6361. (§ 5702). Par. 5. Benefit of counsel, accusation, list of witnesses, compulsory process, and trial.

See notes to P. C. § 211(28).

This section is not violated by court's exclusion of argument on matter without the evidence. *Jones v. State*, 166 Ga. 251, 254, 142 S. E. 866.

This constitutional guaranty of "benefit of counsel" means something more than the mere appointment by the court of counsel to represent the accused. He is entitled to a reasonable time for preparation by such counsel to properly represent him on the trial. *Sheppard v. State*, 165 Ga. 460, 465, 141 S. E. 196.

§ 6362. (§ 5703.) Par. 6. Crimination of self not compelled.

Evidence Obtained from Receiver of Accused.—The introduction of documentary evidence obtained from a receiver of the property and assets of one accused of crime, by the process of subpoena duces tecum, although such evidence may be incriminatory in its nature and tend to convict the accused of crime, is not violative of this section. *Rawlings v. State*, 163 Ga. 406, 136 S. E. 448.

§ 6364. (§ 5705.) Par. 8. Jeopardy of life, etc., more than once, forbidden.

See notes to P. C. 1068.

Cited in *Reed v. State*, 163 Ga. 206, 212, 135 S. E. 748; dissenting opinion in *Cliett v. State*, 167 Ga. 835, 840, 147 S. E. 35.

§ 6369. (§ 5710). Par. 13. Religious opinions, etc.

Cited in *Sheppard v. Edison*, 166 Ga. 111, 142 S. E. 535.

§ 6370. (§ 5711.) Par. 14. Appropriations to sects forbidden.

See annotations to § 6454.

§ 6372. (§ 5713). Par. 16. Searches and warrants.

Applied in *Young v. Western & Atlantic R. Co.*, 39 Ga. App. 761, 766, 148 S. E. 414.

§ 6376. (§ 5717.) Par. 20. Contempts.

Cited in *Pullen v. Cleckler*, 162 Ga. 111, 114, 132 S. E. 761.

§ 6379. (§ 5720.) Par. 23. Legislative, judicial, and executive, separate.

See notes to § 2366(71).

Editor's Note and General Considerations.—The judicial department of the government can not interfere with any provision made by the legislative branch of the government which the General Assembly may deem to be necessary as expenses in discharging its duties of legislation. *Speer v. Martin*, 163 Ga. 535, 537, 136 S. E. 425.

Instances Where Section Not Violated.—The banking law of 1919 is not repugnant to this section. *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

SECTION 2

Certain Offenses Defined

§ 6382. (§ 5723). Par. 1. Libel; jury in criminal trials.

See notes to § P. C. 1060(2).

Applied in *Allen v. State*, 164 Ga. 669, 139 S. E. 415.

SECTION 3

Protection to Person and Property

§ 6388. (§ 5729.) Paragraph 1. Private ways; just compensation.

In General.—In *City Council of Augusta v. Lamar*, 37 Ga. App. 418, 140 S. E. 763, after quoting this section, the court says: "Accordingly, if property is damaged, even by the prudent and proper exercise of a power conferred by statute, the owner is entitled to just compensation in an amount represented by the difference between the market value of the property before and after the procedure taken for public purposes."

Effect of Enhancement of Value upon Amount of Damages.—In the application of this provision of the fundamental law the courts have uniformly recognized the rule that where none of the property, or only a part of it, is actually taken for public use, any enhancement of the market value which arises directly from such public improvement and which accrues directly to the particular property remaining may be set off against the gross damage which may be thus occasioned. *Muecke v. Macon*, 34 Ga. App. 744, 131 S. E. 124.

Applied *State Highway Board v. Baxter*, 167 Ga. 124, 144 S. E. 796; *Brown v. Atlanta*, 167 Ga. 416, 145 S. E. 855; *Atlanta v. Hines*, 39 Ga. App. 499, 500, 147 S. E. 416; *Habersham County v. Cornwall*, 38 Ga. App. 419, 420, 144 S. E. 55.

Cited in *Smith v. Floyd County*, 36 Ga. App. 554, 137 S. E. 646; *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 528, 131 S. E. 517.

§ 6389. (§ 5730.) Par. 2. Attainder; ex post facto and retroactive laws, etc.

Instances of Valid Acts.—Municipal ordinance requiring deposits by consumers of light and water, though having meters, not invalid under this section as impairing the obligation of contract. *Young v. Moultrie*, 163 Ga. 829, 831, 137 S. E. 257.

Cited in *Cochran v. Thomasville*, 167 Ga. 579, 584, 146 S. E. 462.

SECTION 4

Special Legislation Forbidden

§ 6391. (§ 5732.) Paragraph 1. General laws, and how varied.

See §§ 828(ppp); 828(19); 913(2); 913(13); 913(23); P. C. 1060(2).

Collection of Fees.—In so far as the act of 1917, purports to make the costs and fees of the sheriff the property of the particular county, and to make it the duty of the clerk of the superior court to collect and distribute such fees, it is a special law relating to a matter covered by existing general laws, and to that extent the act is violative of this section. *Harris County v. Williams*, 167 Ga. 45, 144 S. E. 756.

Instances of Special Laws.—The act of 1924 (Ga. Laws 1924, p. 275) authorizing counties to change road in a town, is a special law and unconstitutional under this section. *Shore v. Banks County*, 162 Ga. 185, 186, 132 S. E. 753.

Section not applied to special law creating a city charter. *Baugh v. LaGrange*, 161 Ga. 80, 82, 130 S. E. 69.

Cited in *Cochran v. Thomasville*, 167 Ga. 579, 584, 146

S. E. 462; *Mayor v. Wilkinson County*, 166 Ga. 460, 143 S. E. 769.

§ 6392. (§ 5733). Par. 2. What acts void.

Quoted in *Roberson v. Roberson*, 165 Ga. 447, 141 S. E. 306.

Cited in *Speer v. Martin*, 163 Ga. 535, 539, 136 S. E. 425.

SECTION 5

Governmental Rights of the People

§ 6393. (§ 5734.) Paragraph 1. State rights.

Cited in *Green v. Atlanta*, 162 Ga. 641, 648, 135 S. E. 84.

§ 6394. (§ 5735.) Par. 2. Enumeration of rights not deny others.

Cited in *Green v. Atlanta*, 162 Ga. 641, 648, 135 S. E. 84.

ARTICLE 2

Elective Franchise

SECTION 1

Qualification of Voters

§ 6397. Par. 3. Who entitled to register and vote.

See note under section 34 paragraph 3.

SECTION 2

Registration

§ 6404. (§ 5738). Par. 1. Registration; who disfranchised.

In *Parks v. Ash*, 168 Ga. 868, 874, 149 S. E. 207, after quoting this section and sections 6406 and 6407 it is said: "But we do not think that the framers of the constitution intended that these sections should be exhaustive as to the disqualification of persons to fill offices that might be created by statute. Certain offices are created by the constitution itself, and in certain cases the constitution prescribes the qualifications which will prevent one from holding or being eligible to such office; and where the constitution does thus fix the grounds of qualification and disqualification, the legislature can not by statute take from or add to those grounds. But the office of county tax assessor and membership in the board of commissioners of roads and revenues are not fixed by the constitution, and those bodies are not created by the constitution. They are the creatures of statutes; and that being true, the legislature, which enacts the law that establishes either of these boards, can deal with the subject of qualification and disqualification, provided they do not impinge on any express provision in the constitution of the State or of the United States."

ARTICLE 3

Legislative Department

SECTION 7

Enactment of Laws

§ 6430. (§ 5764.) Par. 1. Elections, returns, etc., disorderly conduct.

Under the provisions of this section the judge of the superior court did not have jurisdiction to hold, in quo warranto proceedings, that a member of the General Assembly of Georgia, who had been elected to that position and who had been sworn in as a member, was ineligible or disqualified for membership in that body; and the demurrer raising the contention that the court was without jurisdiction should have been sustained. *Rainey v. Taylor*, 166 Ga. 476, 143 S. E. 383.

§ 6437. (§ 5771.) Par. 8. One subject-matter expressed.

See application as to section 3438, P. C. §§ 461(12), 419(1).

See notes to §§ 1551(136), 2366(52); P. C., §§ 211(28), 1069(1).

Instances Where Section Not Violated.—The banking law of 1919 is not repugnant with this section. *Felton v. Bennett*, 163 Ga. 849, 137 S. E. 264.

The act of 1901 to create a new charter for the city of LaGrange held not violative of this section. *Baugh v. LaGrange*, 161 Ga. 80, 130 S. E. 69.

Acts of 1925 (Laws 1925, p. 896) amending incorporation law of certain school was held not unconstitutional under this section. *English v. Smith*, 162 Ga. 195, 133 S. E. 847.

Municipal ordinance relating to salaries of firemen was held not unconstitutional under this section. *Green v. Atlanta*, 162 Ga. 641, 135 S. E. 84.

An ordinance regulating sales of milk, and prohibiting sales of impure milk, is not violative of this section. *Leontas v. Walker*, 166 Ga. 266, 273, 142 S. E. 891.

The act of 1925 creating the municipal court of Macon, permitting oral charges to the jury is not unconstitutional because in conflict with this section. *Robinson v. Odom*, 168 Ga. 81, 147 S. E. 569.

§ 6445. (§ 5779.) Par. 17. Statutes and sections of Code, how amended.

Acts Not Violative.—The acts of 1924 as to recovery for homicide of parent (Ga. L. 1924, p. 60) is not unconstitutional as being in violation of this section. *Peeler v. Central, etc., R. Co.*, 163 Ga. 784, 137 S. E. 24.

This section was not violated by the act of 1925 amending the law under which Barnesville School is incorporated. *English v. Smith*, 162 Ga. 195, 199, 133 S. E. 847.

Repeals by implication do not fall within the inhibition of this provision of the constitution. *Durham v. State*, 166 Ga. 561, 144 S. E. 109.

§ 6446. (§ 5780.) Par. 18. Corporate powers, how granted.

Cited in *Free Gift Society v. Edwards*, 163 Ga. 857, 864, 137 S. E. 382.

§ 6448. (§ 5782.) Par. 20. Street-railways.

Cited in *Georgia Power Co. v. Decatur*, 168 Ga. 705, 708, 149 S. E. 32.

§ 6450(1). Par. 22A. Zoning and planning laws.

—The General Assembly of the State shall have authority to grant to the governing authorities of the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston

and East Thomaston, and cities having a population of 25,000 or more inhabitants according to the United States Census of 1920 or any future census, authority to pass zoning and planning laws whereby such cities may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvement of real estate therein. The General Assembly is given general authority to authorize the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston and East Thomaston, and cities having a population of 25,000 or more inhabitants according to the United States census of 1920 or any future census, to pass zoning and planning laws. Acts 1927, p. 128.

SECTION 9

Pay of Members

§ 6454. (§ 5788.) Paragraph 1. Compensation.

No Injunction Can Be Granted.—Where the question is not raised that the mileage is in an amount in excess of that allowed by this section, but this proceeding merely seeks to determine under what circumstances such mileage may be allowed by the proper committees and presiding officers of the General Assembly, the courts can grant no injunction to enjoin the Treasurer of the State from paying mileage. *Speer v. Martin*, 163 Ga. 535, 537, 136 S. E. 425.

SECTION 11

Married Woman's Property

§ 6456. (§ 5790.) Paragraph 1. Wife's estate.

See notes to § 3007.

Cited in *Curtis v. Ashworth*, 165 Ga. 782, 786, 142 S. E. 111.

ARTICLE 4

Power of the General Assembly over Taxation, etc.

SECTION 2

Regulation of Corporations

§ 6463. (§ 5797.) Paragraph 1. Railroad tariffs.

Section Not Intended to Limit Powers.—Independently of this provision, the General Assembly possesses the inherent power to regulate public utilities. The conference upon the General Assembly of the powers stated in this section was not intended to limit its powers to those expressed in that provision. *Atlanta Terminal Co. v. Georgia Public Service Commission*, 163 Ga. 897, 137 S. E. 556.

§ 6464. (§ 5798.) Par. 2. Right of eminent domain; police power.

See notes to § 1207.

Police Power—Regulation of Busses Valid.—Ordinance regulating busses for transportation of passengers in streets, held not violative of this section. *Schlesinger v. Atlanta*, 161 Ga. 148, 129 S. E. 861.

ARTICLE 5

Executive Department

SECTION 1

Governor

§ 6481. (§ 5815.) Par. 12. Reprieves and pardons.

Reprieve.—The constitution does not undertake to define what is meant by a reprieve; properly construed, a reprieve by the executive is nothing but a temporary suspension for the period named in the respite of the execution of the sentence imposed by the court. *Gore v. Humphries*, 163 Ga. 106, 114, 135 S. E. 481.

Stay of Execution.—The contention that only the Governor can stay the execution of a sentence in a case where such sentence has been suspended by the Governor in the exercise of his right to suspend the sentence by reprieve is untenable under P. C. sec. 1069(7). *Gore v. Humphries*, 163 Ga. 106, 114, 135 S. E. 481.

SECTION 2

Other Executive Officers

§ 6490. **Salaries.**—The General Assembly shall have power to prescribe the duties, authority, and salaries of the Secretary of State, Comptroller-General, and Treasurer, and to provide help and expenses necessary for the operation of the department of each. Acts 1927, p. 121.

§§ 6491-6492. Repealed by amendment of 1927.

Editor's Note.—Acts 1927, p. 121, repealed §§ 6490-6492 and inserted new section 6490 in lieu thereof.

ARTICLE 6

Judiciary

SECTION 1

Courts

§ 6497. (§ 5831.) Paragraph 1. Courts enumerated.

See notes to § 1551(90).

SECTION 2

Supreme Court, and Court of Appeals

§ 6502. (§ 5836.) Par. 5. Jurisdiction.

Editor's Note.—In regard to the holding set out in the third paragraph under this catchline in the Georgia Code of 1926, it is said that the decision in the *Yesbik* case has since been considered the chart and guide for the Supreme Court in all subsequent cases where the rules there announced were applicable. See *King v. State*, 155 Ga. 707, 712, 118 S. E. 368. *Louisville, etc., R. Co. v. Tomlin*, 161 Ga. 749, 759, 132 S. E. 90.

Where one files a claim to personalty levied upon under an attachment or other process, and in aid of his claim files an amendment in which he seeks affirmative equitable relief, the original proceeding at law is converted into a proceeding both at law and in equity. In such a case, when a writ of error is sued out to review the final judgment, the supreme court has jurisdiction to determine the assignments of error set out in the bill of exceptions. *Benton v. Benton*, 164 Ga. 541, 543, 139 S. E. 63.

Questions of constitutional law, not distinctly raised and passed on in trial court, not decided on review. *Jackson v. Johnson*, 164 Ga. 839, 841, 139 S. E. 663.

Constitutional Questions.—In *Griggs v. State*, 130 Ga. 16, 60 S. E. 103, the Supreme Court said: "This court will not pass upon the constitutionality of a statute unless it appears that the question was made in the court below and passed upon by the trial judge, and further that the particular provision of the constitution alleged to have been offended by the statute was clearly designated." *United States Fidelity, etc., Co. v. Watts*, 35 Ga. App. 447, 451, 133 S. E. 476.

Cited in *Bernstein v. Fagelson*, 166 Ga. 281, 286, 142 S. E. 862.

§ 6506. Par. 9. Court of Appeals.

Nature of Question Certified—Constitutional Question.—See *Daniel v. Claxton*, 35 Ga. App. 107, 132 S. E. 411, holding the same as the second sentence under this catchline in the Georgia Code of 1926, citing *Gulf Paving Co. v. Atlanta*, 149 Ga. 114, 99 S. E. 374.

Dismissal Case Reinstated.—Since the court has never formulated the rules contemplated by the amendment of 1916 and at present no statute or rule provides for the giving of notice to counsel of the hearing of cases in this court, where counsel did not receive the notice which was mailed to him and hence failed to prosecute and the case was dismissed the court will reinstate the case in its discretion. *Winder v. Winder Nat. Bank*, 161 Ga. 882, 884, 132 S. E. 217.

Applied in *Georgia Railroad, etc., Co. v. Stanley*, 38 Ga. App. 773, 778, 145 S. E. 530.

Cited in *Winder v. Winder Nat. Bank*, 161 Ga. 882, 132 S. E. 217; concurring opinion in *Moreland v. State*, 164 Ga. 467, 472, 139 S. E. 77.

SECTION 4

Jurisdiction of Superior Courts

§ 6516. (§ 5848.) Par. 7. Judgment by the court.

See note under section 5662.

Cited in *Pierce v. Jones*, 36 Ga. App. 561, 137 S. E. 296.

SECTION 7

Justices of the Peace

§ 6523. **Paragraph 1. Justices, number and term.**—There shall be in each militia district one justice of the peace, whose official term, except when elected to fill an unexpired term, shall be four years; provided, however, that the General

Assembly may, in its discretion, abolish justice courts and the office of justice of the peace and of notary-public ex-officio justice of the peace in any city of this State having a population of over twenty thousand, and establish in lieu thereof such court or courts or system of courts as the General Assembly may, in its discretion, deem necessary, conferring upon such new court or courts or system of courts, when so established, the jurisdiction as to subject-matter now exercised by justice courts and by justices of the peace and notaries public ex-officio justices of the peace, together with such additional jurisdiction, either as to amount or subject-matter, as may be provided by law, whereof some other court has not exclusive jurisdiction under this Constitution; together with such provision as to rules and procedure in such courts, and as to new trials and the correction of errors in and by said courts, and with such further provision for the correction of errors by the Superior Court, or Court of Appeals, or the Supreme Court, as the General Assembly may, from time to time, in its discretion, provide or authorize. Any court so established shall not be subject to the rules of uniformity laid down in Paragraph 1 of Section 9 of Article 6 of the Constitution of Georgia. And provided, however, that the General Assembly, in its discretion, may abolish justice courts and the office of justice of the peace and notary public ex-officio justice of the peace in any county in this State having within its borders a city having a population of over twenty thousand, and establish in lieu thereof such court or courts or system of courts as the General Assembly may, in its discretion, deem necessary; or conferring upon existing courts, by extension of their jurisdiction, the jurisdiction as to subject-matter now exercised by justice courts and by justices of the peace and notaries public ex-officio justices of the peace, together with such additional jurisdiction, either as to amount or to subject-matter as may be provided by law, whereof some other court has not exclusive jurisdiction under this Constitution; together also with such provisions as to rules and procedure in such courts, and as to new trials and the correction of errors in and by said courts, and with such further provision for the correction of errors by the Superior Court or the Court of Appeals or the Supreme Court as the General Assembly may, from time to time, in its discretion, provide or authorize. The Municipal Court of Atlanta shall have jurisdiction in Fulton County and outside the city limits of Atlanta either concurrently with, or supplemental to or in lieu of justice courts, as may be now or hereafter provided by law. Any court so established shall not be subject to the rules of uniformity laid down in Paragraph 1 of Section 9 of Article 6 of the Constitution of Georgia. Provided that nothing herein contained shall apply to Richmond County. Acts 1927, pp. 118, 119.

Under constitutional amendment of 1912 of this section, the General Assembly was authorized to abolish the offices of justice of the peace and notary public and ex-officio justice of the peace in certain cities, and to establish in lieu thereof "such court or courts or system of courts as the General Assembly may deem necessary." Under said amendment express authority was granted to the General Assembly to confer upon such new court or courts "additional jurisdiction either as to amount or subject-matter as may be provided by law," with certain limita-

tions not material to the present issue. *Collier v. Duffell*, 165 Ga. 421, 141 S. E. 194.

It follows from the above rulings, that, while the General Assembly had express constitutional authority to confer additional jurisdiction within the prescribed limitation "as to amount or subject-matter," such provision can not by implication or inference deny to the General Assembly the power also of conferring additional territorial jurisdiction (not inconsistent with the constitution of Georgia and not repugnant to the Federal constitution). Said amendment of 1912 does not in any manner restrict the General Assembly in the matter of territorial jurisdiction. *Collier v. Duffell*, 165 Ga. 421, 141 S. E. 194.

SECTION 9

Uniformity of Courts

§ 6527. (§ 5859.) Paragraph 1. Uniformity provided for.

See notes to P. C. § 1060(2).

The act of 1925 creating the municipal court of Macon, permitting oral charges to the jury is not unconstitutional because in conflict with this section. *Robinson v. Odom*, 168 Ga. 81, 147 S. E. 569.

SECTION 13

Judicial Salaries

§ 6533. (§ 5864.) Paragraph 1. Salaries of judges, etc.—The Justices of the Supreme Court each shall have out of the Treasury of the State salaries of \$7,000.00 per annum; the Judges of the Court of Appeals each shall have out of the Treasury of the State salaries of \$7,000.00 per annum; the Judges of the Superior Court each shall have out of the Treasury of the State salaries of \$5,000.00 per annum; the attorney-general shall have a salary not to exceed two thousand dollars per annum; and the solicitor-general each shall have salaries not to exceed two hundred and fifty dollars per annum; but the attorney-general shall not have any fee or perquisite in any cases arising after the adoption of this Constitution; provided that the County of Chatham shall, from its treasury, pay to the Judge of the Superior Courts of the Eastern Circuit \$5,000.00 per annum; said payments are hereby declared to be a part of the court expenses of said county, and shall be made to the judge now in office, as well as his successors. Provided further, That the Board of County Commissioners of Fulton County, or such other board of persons as may from time to time exercise the administrative powers of Fulton County, shall have power and authority to pay the Judges of the Superior Court of Fulton County such sums, in addition to the salaries paid by the State, as said administrative authority or authorities may deem advisable, and the amounts so paid are declared to be a part of the court expenses of said county. Provided further, That the Board of County Commissioners of the counties of Clarke, Floyd, Sumter, and Bibb, or such other board or person as may from time to time exercise the administrative powers of said several counties, may supplement from their respective county treasuries the sal-

aries of the Judges of the circuits of which they are a part by such sum as may be necessary with salaries paid each of said judges from the State Treasury to make a salary of \$6,000.00 each per annum of such judges; and such payments are declared to be a part of the court expenses of said counties, and such payments shall be made to the judges now in office, as well as to their successors. Provided further, That the County of Fulton may supplement the salary of the Judge of the Stone Mountain Circuit, or the judges of such other circuit as may be hereafter required to regularly preside therein, for additional services rendered in the Superior Court of said county, such sum as will, with the salary paid such judge from the State Treasury, make a salary of \$6,000.00 per annum; said payments are declared to be a part of the court expenses of Fulton County, such payments to be made to the judge now in office, as well as to his successors. The provisions of this amendment shall take effect and the salaries herein provided for shall begin from the ratification of this amendment, as provided in the second section hereof, and shall apply to the incumbents in the several offices, as well as their successors; and provided, further, that the board of county commissioners of the County of Richmond, or such other board or person as may from time to time exercise the administrative powers of said county, shall supplement from said county's treasury the salary of the judge of the Superior Court of the circuit of which the said County of Richmond is a part, by such sum as may be necessary with salaries paid such judge from the State Treasury to make a salary for said judge of \$7,000.00 per annum; and such payments are declared to be a part of the court expenses of said county, and such payment shall be made to the judge now in office, as well as to his successors. The provisions of this amendment shall take effect and the salaries herein provided for shall begin from the ratification of this amendment, as provided in the second section thereof, and shall apply to the incumbent in office, as well as his successors. The Act of the General Assembly of 1904 entitled "An Act to regulate the salaries of Judges of the Superior Courts of all Judicial Circuits of this State having, or that may hereafter have therein a city with a population of not less than 54,000, nor more than 75,000 inhabitants, and for other purposes," with the Acts of the General Assembly of 1905 and 1906 amendatory thereof; and also of the Act of the General Assembly of 1906, entitled "An Act to Regulate the Compensation of Judges of the Superior Courts for services rendered outside of their own Circuits in those Judicial Circuits of the State having therein a city of not less than 75,000 inhabitants according to the Census of 1900, and for other purposes," which Acts provide for the payment from the treasuries of the counties containing said cities to the judges aforesaid of a part of their salaries, are ratified, validated and confirmed as to the dates of said respective enactments. Provided, that the County of Muscogee from and after January 1, 1927, shall pay from its treasury to the Superior Court judges of the circuit of which it is a part such sums as will with the salary paid each judge from the State Treasury, make a

salary of eight thousand dollars per annum to each judge, and said payments are declared to be a part of the court expense of such county. Acts 1910, p. 42; 1913, p. 30; 1916, p. 22; 1917, p. 36; 1918, p. 94; 1920, p. 20; 1922, p. 26; 1925, p. 70; 1927, p. 112.

§ 6534. (§ 5865.) Par. 2. How salaries may be changed.

The 1916 amendment of this section does not affect the right of sheriffs of the counties of this State to the fees allowed them by law, nor does it purport to affect the power of the solicitors-general, as provided by law, to collect and disburse fees due to other officers of court, such as sheriffs, or the like. *Harris County v. Williams*, 167 Ga. 45, 144 S. E. 756.

SECTION 15

Divorce

§ 6537. (§ 5868.) Par. 2 Last jury determines disabilities.

Cited in *Baker v. Baker*, 168 Ga. 478, 148 S. E. 151.

SECTION 16

Venue

§ 6540. (§ 5871.) Par. 3. Equity cases.

See annotation to § 5527.

The proceeding to foreclose the lien in the instant case was one in equity. This being so, the present suit ought to be brought in the county of the residence of a defendant against whom substantial relief is prayed. *Middleton v. Westmoreland*, 164 Ga. 324, 330, 138 S. E. 852.

When an alleged landlord sued out a statutory proceeding to eject an alleged tenant for non-payment of rent, the latter could file her suit in equity against the alleged landlord to enjoin the dispossession proceeding, where she denied that the relation of landlord and tenant existed between her and the plaintiff in such proceeding, but alleged that she held under such plaintiff under a contract of sale, and in the same suit, in a proper case, could seek specific performance, by the plaintiff in such proceeding, of the contract of sale, without being required to file a counter-affidavit to such proceeding that to give the bond required by the statute to arrest such proceeding, and without being required to file her suit for such equitable relief in the county where such proceeding was instituted. *Harvey v. Atlanta & Lowry National Bank*, 164 Ga. 625, 139 S. E. 147.

Generally suits for equitable relief must be brought in the county of the residence of a defendant against whom substantial relief is prayed. *Waters v. Waters*, 167 Ga. 389, 145 S. E. 460.

At an interlocutory hearing in vacation prior to the appearance term, the trial judge was authorized to hear and determine demurrers in a county other than that of the residence of the defendant or defendants where the equitable suit was pending. The hearing and judgment on demurrer was not a trial of the case as contemplated by this section. *Holman v. Bridges*, 165 Ga. 296, 140 S. E. 886.

Territorial jurisdiction of justices or municipal court may be enlarged by legislative enactment. *Collier v. Duffell*, 165 Ga. 421, 141 S. E. 194.

§ 6541. (§ 5872.) Par. 4. Suits against joint obligors, etc.

It was sufficiently alleged that defendants were joint trespassers; and being so, they were properly joined as parties defendant, and the venue of the suit as to both

was in the county of the residence of either. *Flowers v. Chamblee*, 165 Ga. 703, 141 S. E. 907.

§ 6543. (§ 5874.) Par. 6. All other cases.

See notes to § 2259.

Applied in *Collier v. Duffell*, 165 Ga. 421, 141 S. E. 194; *Citizens, etc., Bank v. Taggart*, 164 Ga. 351, 356, 138 S. E. 898.

SECTION 18

Jury Trials

§ 6545. (§ 5876.) Paragraph 1. Trial by jury.

See notes to §§ 3141(1), 5141.

Contempt Proceeding.—In a proceeding for contempt against the defendant, growing out of his alleged violation of a mandamus absolute, he is not entitled to a trial by a jury when an issue of fact is raised. *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 298, 130 S. E. 580.

Instances Where Section Not Violated.—Section 1697(13) is not unconstitutional as violative of this section. *Lewis v. State Board*, 162 Ga. 263, 133 S. E. 469.

ARTICLE 7

Finance, Taxation, and Public Debt.

SECTION 1

Power of Taxation

§ 6551. (§ 5882.) Paragraph 1. Taxation, how and for what purposes exercised.

Power of Taxation Limited.—The General Assembly has only those powers of taxation over the State which it is permitted to exercise under the grant of power contained in the constitution. *Brown v. Martin*, 162 Ga. 172, 174, 132 S. E. 896.

SECTION 2

Taxation and Exemptions

§ 6553. (§ 5883.) Paragraph 1. Must be uniform, etc.; domestic animals.

See notes to § 993(235).

Cited in *Cochran v. Thomasville*, 167 Ga. 579, 584, 146 S. E. 462.

II. TAXES IMPOSED BY MUNICIPALITIES.

Instances of Municipal Taxes.—Under the general language of this section, a leasehold estate in state owned property (governor's mansion) is taxable by a municipality. *Henry Grady Hotel Co. v. Atlanta*, 162 Ga. 818, 135 S. E. 68.

§ 6554(a). Park's Code.

See § 6554(1).

§ 6554(1). Par. 2A. Industries exempt.

Where a resident corporation of this State, which owns and operates a cotton factory, purchases existing warehouses for the storage of cotton to be manufactured at its

factory, and for the storage of the finished products, such warehouses constituting an existing warehouse plant are not an enlargement of its cotton factory within the meaning of the above provisions of the constitution of this State, and the same are not exempt from taxation under this provision of the constitution. *Columbus v. Muscogee Mfg. Co.*, 165 Ga. 259, 140 S. E. 860.

SECTION 6

Purposes of Taxation by Counties and Cities

§ 6561. (§ 5891.) Paragraph 1. Restrictions on counties and cities.

Section 7 of the act of August 10 (acts 1920, pp. 741, 744), which provides for the issuing of executions to enforce assessments for paving sidewalks against abutting lots or the owners thereof in the city of Bainbridge the levy of such executions, and sales thereunder, as in cases of sales for city taxes, does not violate this section. *Bower v. Bainbridge*, 168 Ga. 616, 148 S. E. 517.

§ 6562. (§ 5892.) Par. 2. Taxing power of counties limited.

See notes to § 3154(2).

The word "roads" does not include "streets" of municipalities in the county. *Mitchell County v. Cochran*, 162 Ga. 810, 815, 134 S. E. 768.

Applied in *Commissioners v. Martin*, 161 Ga. 220, 130 S. E. 569; *McGennis v. McKinnon*, 165 Ga. 173, 141 S. E. 910.

Cited in *Bank v. Hagedorn Constr. Co.*, 162 Ga. 488, 499, 134 S. E. 310.

SECTION 7

Limitation on Municipal Debts

§ 6563. Park's Code.

See §§ 6563, 6563(1).

§ 6563. (§ 5893.) Paragraph 1. Debt of counties and cities not to exceed seven per cent. —

Provided that the City of Columbus may issue and sell "street-improvement bonds" without the said assent of two-thirds of the qualified voters at an election called thereon, but upon a majority vote of the members of its governing body, with these limitations: First, the terms of such bonds shall in no case exceed ten years. Second, the amount of each issue shall be limited to the amount assessed by such municipality upon each improvement. Third, these bonds shall be issued only for the grading, including curbs and gutters, or paving or repaving of streets or portions of streets or sidewalks. Fourth, the interest thereon shall not exceed six per centum per annum. Fifth, these bonds may be issued without regard to the amount of other outstanding debts or bonds of such municipality. Sixth, these bonds not to be issued except in case such grading, including curbs and gutters, pavement, or repaving has been petitioned for in writing by the owners of more than fifty per cent. of the property abutting on the street or portion of street paved or repaved.

Except that the City of LaGrange, from time to time as necessary for the purpose of repairing, purchasing, or constructing a waterworks

system, including all necessary pipe-line, pumping-stations, reservoirs, or anything else that may be necessary for the building, constructing, or operating a waterworks system for the City of LaGrange, may incur a bonded indebtedness in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of five hundred thousand (\$500,000.00) dollars, and such indebtedness not to be incurred except with the assent of two-thirds of the qualified voters of said city at an election or elections to be held as may now or may hereafter be prescribed by law for the incurring of new debts by said City of LaGrange.

And except that Fulton County and/or Chatham County, and/or Richmond County may, in addition to the debts hereinbefore allowed, make temporary loans between March 1st and December 1st in each year, to be paid out of the taxes received by the county in that year, said loans to be evidenced by promissory notes signed by the chairman and clerk of the board having charge of the levying of taxes in said county and previously authorized by resolution by a majority vote at a regular monthly meeting of such board entered on the minutes. The aggregate amount of said loans outstanding at any one time shall not exceed fifty per cent. of the total gross income of the county from taxes and other sources in the preceding year, and no new loans shall be made in one year until all loans made in the previous year have been paid in full.

And except that the County of Ware may be authorized to increase its bonded indebtedness in the sum of two hundred and fifty thousand dollars in addition to the debts hereinbefore in this paragraph allowed to be incurred, and at a rate of interest not to exceed five per centum per annum; which said bonds shall run for a period or periods of time not to exceed thirty years, and may be issued from time to time, and in such denominations as may be determined by the county authorities of said county, to be signed by the commissioner of roads and revenues of said county, and the clerk of said commissioner, and shall be known and designated as Hospital Construction and Equipment bonds, and which said bonds shall be sold, and the proceeds thereof used and handled by the commissioner aforesaid, acting with the clerk and ordinary, or by a committee or commission selected, appointed, and qualified in such way or method as such county authority may designate. The proceeds of all bonds issued and sold under this authority shall be used for the purpose of acquiring a hospital-site in the City of Waycross, or outside of Waycross, in Ware County, and building, constructing, and equipping thereon a hospital where medical and surgical treatment and care may be provided those in need of such. The power conferred by this amendment shall be exercised under such rules and regulations respecting the acquiring of a site, the building and equipping of said hospital, as well as the operation of the same, providing for payment for such medical and surgical treatment and care in such hospital, excepting only charity cases as the county authorities acting alone or in conjunction with the Waycross medical society may deem

meet and proper. Acts 1927, pp. 110, 113, 123, 125.

See notes to § 1551(155).

Editor's Note.—Only the amendments of this section subsequent to the Code of 1926 are set out above.

This section was adopted in view of existing C. C. § 507. Central Ry. Co. v. Wright, 165 Ga. 1, 18, 139 S. E. 890.

Amended in 1918.—Illegal diversion of bond money to purpose other than that specified, restrained. Fayetteville v. Huddleston, 165 Ga. 899, 902, 142 S. E. 280. See Matthews v. Darby, 165 Ga. 509, 510, 141 S. E. 304.

Debt Held Created.—Upon a proper construction of the proposed contract, giving due consideration to its substance and looking to the intention of the parties as revealed from the paper in its entirety, the obligations of the city would amount to the creation of a debt within the meaning of this section. Byars v. Griffin, 168 Ga. 41, 147 S. E. 66.

Definitions.—A registered voter under this section is one who had been lawfully registered and who has the present right to vote. Persons merely entitled to be registered or those lawfully registered who have been disqualified to vote are not included. Daniel v. Claxton, 35 Ga. App. 107, 132 S. E. 411.

Issuance of Notes in Excess of Limit.—An issue of notes in excess of the limit allowed by this section is void since the tax digest of the county will show the assessed valuation. And the county cannot make recitals which will estop it from denying that the loan is in excess of the limit. Baker v. Rockdale County, 161 Ga. 245, 130 S. E. 684.

Municipal Contract for Property Valuation.—Section is not violated by municipal contract for special services in valuing property for taxation. Tietjen v. Savannah, 161 Ga. 125, 134, 129 S. E. 653. Such contract was held not to constitute a debt within the meaning of the section. Id.

§ 6563(1). Paragraph 1a. Coastal Highway District; bonds; commissioner.

Editor's Note.—The Act of 1929, p. 217, § 1, provides that "the Board of Commissioners of the Coastal Highway District of Georgia shall have power and authority to employ a fiscal agent at such compensation as may be fixed by the board; and said fiscal agent shall have authority to collect the assessments required for the payment of interest and retirement of bonds of the Coastal Highway District from the counties composing said district, and, from the sums so collected, to pay the interest and retire the bonds. And said fiscal agent shall have such other duties and authority as may be fixed by said board of commissioners, not inconsistent with the law." And by § 2 it is further provided that "any condemnation proceedings instituted by the Coastal Highway District for the purpose of acquiring additional rights of way or borrow pits may be instituted either under section 5206 et seq. of the Code of Georgia, or under the Acts of 1914, page 92, as codified in section 5246(1) et seq. of Michie's Code of Georgia."

§ 6564. (§ 5894.) Par. 2. County and city bonds, how paid.

It can not be presumed that in the issuance of the bonds in this case provision for the payment of the indebtedness had not been made before the addition of the territory embraced in Union Grove district. That question was concluded by the judgment of validation. Towns v. Workmore Public School District, 166 Ga. 393, 396, 142 S. E. 877.

The fact that the light plant and the city hall were built with the proceeds of bonds sold by the city does not require that the proceeds of the sales of these properties should be applied to the redemption of these securities, these properties being in no way pledged by the city to the payment of these bonds, and the constitution of this State requiring that the city should, at or before the time of issuing said bonds, provide for the assessment and collection of an annual tax sufficient in amount to pay the principle and interest of any bonded indebtedness within thirty years from the date of the incurring of the same. Matthews v. Darby, 165 Ga. 509, 141 S. E. 304.

Installment Bonds.—Nothing in this section is inconsistent with the authorization of an issue of bonds in installments and the levy of the tax for the payment of each installment in the year of its issue. Brady v. Atlanta, 17 Fed. (2d), 764.

Cited in Bank v. Hagedorn, etc., Constr. Co., 162 Ga. 488, 498, 134 S. E. 310; Seaboard Air Line R. Co. v. Liberty County, 39 Ga. App. 75, 76, 146 S. E. 771.

SECTION 16

Donations

§ 6573. (§ 5903.) Paragraph 1. Donations forbidden.

The resolution relieving the bondsmen of liability, and directing the payment by Miller County to the sureties the amounts paid by them, is void and of no effect, because it violates this section. The resolution was an attempt by the General Assembly to donate to the sureties funds of Miller County, which is beyond its constitutional power. *Smith v. Fuller*, 135 Ga. 271, 69 S. E. 177, Ann. Cas. 1912A, 70; *Geer v. Dancer*, 164 Ga. 9, 137 S. E. 558.

ARTICLE 8

Education

SECTION 1

Common Schools

§ 6576. (§ 5906.) Paragraph 1. Common schools.

The State system of education provided for in the above provision of the constitution embraces high schools operated by funds whether derived from taxation or otherwise; and no matriculation fee can be charged for children within the school age. *Brinson v. Jackson*, 168 Ga. 353, 148 S. E. 96.

A consolidated public school or high school established and maintained in a consolidated school district in part by the funds provided by the act of August 18, 1919 (Acts 1919, p. 287), is a common school of this State, admission to which must be free. The trustees by accepting the benefits of such funds are estopped from denying that this school is subject to the above constitutional provision making the common schools free to the children of the State, residing in the district. *Wilson v. Stanford*, 133 Ga. 483, 66 S. E. 258; *Brinson v. Jackson*, 168 Ga. 353, 148 S. E. 96.

Cited in *Hooten v. Hooten*, 168 Ga. 86, 147 S. E. 373.

SECTION 4

Educational Tax

§ 6579. (§ 5909.) Paragraph 1. Local taxation for public schools.

See notes to §§ 1551(130), 1551(136).

The provision of the municipal charter of the city of Edison is sufficiently broad to authorize exercise of the power of eminent domain by the municipality for enlargement of school grounds maintained by the city for public schools. *Sheppard v. Edison*, 166 Ga. 111, 142 S. E. 535.

A local school tax of 5 mills levied for educational purposes by the county authorities under the authority of the Civil Code, § 1534, after an authorization by a popular vote in the year 1912, was preserved by the constitutional amendment of 1920, which provides that "no additional election shall be required to maintain any local school tax not in existence in districts, counties, or municipalities." This constitutional amendment, which authorizes the county authorities to levy a tax for educational purposes without a vote if the people authorizing the tax, and which also preserves the local county taxes for educational purposes already levied by the county authorities under authority of the vote of the people as was provided by the law before the passage of the amendment, does not authorize the imposition of a tax by counties for educational purposes in excess of 5 mills, although the tax may have been levied by virtue of authority obtained by vote of the people. *McIntosh County v. Seaboard Air-Line Ry. Co.*, 38 Ga. App. 611, 144 S. E. 687.

Property Subject to Tax Levy.—The taxes provided for by this section can only be levied upon "all taxable property of the county outside of independent local systems" for the support of county schools under the control of county boards of education. *Almand v. Board*, 161 Ga. 911, 131 S. E. 897.

When Limit Is Reached.—Where the limit of five mills has been reached by a local tax for the support of public schools, the county authorities can not be compelled, on the recommendation of the board of education, to levy an additional tax for educational purposes. Such additional tax is not permissible under the law, outside of the independent local systems. *Brown v. Martin*, 162 Ga. 172, 132 S. E. 896.

ARTICLE 9

Homestead and Exemptions

SECTION 1

Homestead

§ 6582. (§ 5912.) Paragraph 1. Homestead and exemption.

Constitutionality—Increase of Exemption.—A debtor's right of exemption under this section cannot be increased as to debts in existence without violating contract clause of Federal Constitution. In *re Trammell*, 5 Fed. (2d), 326.

"Setting Apart" of debtor's exempt property is a mere identification of property to which exemption shall be applied, the burden of securing which is put on the debtor. In *re Trammell*, 5 Fed. (2d), 326. And is timely if made before sale, though after levy. Id.

Same—Bankruptcy Proceedings.—Property exempt under this section and section 3416, but not set apart prior to petition in bankruptcy, may be set apart in the bankruptcy proceeding. In *re Trammell*, 5 Fed. (2d), 326. And the action of the bankruptcy court is equivalent to action by State Court in effectuating exemption. Id.

What Constitutes Head of a Family.—A resident of Georgia having no family within State, but having mother in Poland and sister in another state to whom he regularly sends money, is not the head of a family within the meaning of this section, and section 3416. In *re Trammell*, 5 Fed. (2d), 326.

Alienage of resident of state is no bar to claim of exemption provided by Const. Ga. Art. 9, section 1, and section 3416. In *re Trammell*, 5 Fed. (2d), 326.

ARTICLE 11

Counties and County Officers

SECTION 1

Counties

§ 6594. (§ 5924.) Paragraph 1. Counties are corporate bodies.

Liability of County to Suit Generally.—This section subjects the counties of this State to suit, but not to suits upon all causes of action. It does not make them generally liable to suits, like individuals or as municipal corporations. Being political subdivisions of the State, they can not be sued unless made subject to suit expressly or by necessary implication. *Decatur County v. Praytor, etc.*, *Contracting Co.*, 163 Ga. 929, 137 S. E. 247.

Cited in *McGinnis v. McKinnon*, 165 Ga. 713, 141 S. E. 910.

§ 6597. (§ 5927.) Par. 4. Change of county-sites.

See notes to § 1551(136).

Otherwise than by amendment of this section in 1919 county commissioners are not responsible for obligations incurred by board of education to teachers. Rabinowitz v. Douglas, 168 Ga. 698, 148 S. E. 740.
Applied in Stapleton v. Martin, 164 Ga. 336, 138 S. E. 767.

SECTION 2

County Officers

§ 6599. (§ 5929.) Paragraph 1. County officers.
Cited in Culbreth v. Cannady, 168 Ga. 444, 446, 148 S. E. 102.

SECTION 3

Uniformity in County Offices

§ 6600. (§ 5930.) Paragraph 1. County of-
fices to be uniform.
Cited in McDaniel v. Thomas, 162 Ga. 592, 593, 133 S. E. 624; Culbreth v. Cannady, 168 Ga. 444, 446, 148 S. E. 102.

ARTICLE 12

The Laws of General Operation in Force
in This State

SECTION 1

Laws of Force

§ 6608. (§ 5938.) Par. 7. Existing officers.
Cited in Wiley v. Douglass, 168 Ga. 659, 664, 147 S. E. 735.

CONSTITUTION OF THE UNITED
STATES

ARTICLE 1

Legislative Department

SECTION 3

§ 6626. (§ 5956.) [1.] Senate, how chosen.
Applied in Bryant v. Bush, 165 Ga. 252, 140 S. E. 366.

SECTION 8

§ 6644. (§ 5974.) Powers of congress.
See notes to § 4258.

SECTION 10

§ 6652. (§ 5982.) [1.] Limitations of the powers
of the individual states.
Cited in Cochran v. Thomasville, 167 Ga. 579, 584, 146 S. E. 462.

ARTICLE 8

Amendments.

§ 6700. (§ 6030.) Art. 14. [1.] Citizenship.
See notes to P. C. 247.

Tax Lien upon Property before Improvement.—An act making a tax lien upon property before any paving or im-
provement is begun on the street for which the tax is levied
is not unconstitutional as violative of the due process clause
of this section. Baugh v. LaGrange, 161 Ga. 80, 130 S. E. 69.
Cited in Cochran v. Thomasville, 167 Ga. 579, 584, 146
S. E. 462.

PENAL CODE

CRIMES AND THEIR PUNISHMENT

PRELIMINARY PROVISIONS

§ 1. (§ 1.) Construction of statutes.

Paragraph 9 of this section is the cardinal rule in the construction of statutes, and the intention when ascertained must be carried into effect. *Erwin v. Moore*, 15 Ga. 361. The construction must square with common sense and sound reasoning. *Blalock v. State*, 166 Ga. 465, 470, 143 S. E. 426.

§ 11. (§ 11.) Jeopardy of life, etc.

The plea of former jeopardy was held legally sufficient in *Cliett v. State*, 167 Ga. 835, 147 S. E. 35.

§ 19. (§ 19.) No conviction for an assault or attempt when the crime is actually perpetrated.

Evidence held not authorizing conviction for attempt to commit the crime of attempting the making of liquor. *Raines v. State*, 34 Ga. App. 175, 176, 132 S. E. 243.

Applied in *Jackson v. State*, 38 Ga. App. 138, 142 S. E. 694.

§ 30. (§ 30.) Limitations of prosecutions.

Exception as to Running of Limitation—Allegation and Proof.—In a criminal case, where an exception is relied upon to prevent the bar of the statute of limitations, it must be alleged and proved. *Bazemore v. State*, 34 Ga. App. 773, 131 S. E. 177.

FIRST DIVISION

Definition of a Crime. Persons Capable of Committing. Persons Punishable

ARTICLE 2

Infants, Lunatics, Idiots, and Persons Counseling Them

§ 33. (§ 33.) Persons who are considered of sound mind.

Cited in *Burt v. Gooch*, 37 Ga. App. 301, 302, 139 S. E. 912.

§ 34. (§ 34.) Infant under the age of ten years.

Applied in *McRae v. State*, 163 Ga. 336, 342, 136 S. E. 268.

SECOND DIVISION

Principals and Accessories in Crime

ARTICLE 1

Principals in First and Second Degree

§ 42. (§ 42.) Principals in first and second degree.

Charge of section upheld. *Coggeshall v. State*, 161 Ga. 259, 131 S. E. 57.

Quoted in *Bullard v. State*, 34 Ga. App. 198, 200, 128 S. E. 920.

FOURTH DIVISION

Crimes Against the Person

ARTICLE 1

Homicide

§ 60. (§ 60.) Murder.

See notes to P. C. 67.

Repeating Charge.—After giving the definition of murder as contained in this section, the judge in a subsequent part of the charge again defined murder. The criticism was that repetition of the charge tended to unduly impress on the jury “the law of murder,” and amounted to an expression of an opinion that “the accused was guilty of murder,” and indicated to the jury that the court “believed the defendant guilty and wanted him convicted.” The charge was not erroneous for the reason assigned. *Plymel v. State*, 164 Ga. 677, 139 S. E. 349.

§ 61. (§ 61.) Express malice.

Circumstances Tending to Show Malice.—On the trial of a man for the homicide of his sister-in-law, growing out of a difficulty in which her husband also was killed by the accused, evidence tending to show a previous difficulty between the accused and the husband (although such difficulty occurred several months prior to the homicide), and the existence of bad blood between them, was admissible as tending to show malice, intent, or motive in killing the deceased. *Jeffords v. State*, 162 Ga. 573, 134 S. E. 169.

§ 62. (§ 62.) Implied malice.

This section was properly given in charge in case of passenger cutting conductor who was attempting to eject her from car for improper conduct. *Clinton v. State*, 37 Ga. App. 79, 80, 139 S. E. 82.

§ 63. (§ 63.) Murder, punishment.

Applied in *Morrow v. State*, 168 Ga. 575, 576, 148 S. E. 500.

§ 64. (§ 64.) Manslaughter.

Applied in *Little v. State*, 164 Ga. 509, 139 S. E. 37.

§ 65. (§ 65.) Voluntary manslaughter.

Charge.—In the absence of a timely and appropriate written request, it is not error, in charging upon the law of voluntary manslaughter as contained in this section to fail to qualify the statement that “provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder,” by presenting also the principle that words, threats, or menaces, under the facts of the case might be sufficient to arouse the fears of a reasonable man that his person was in apparent danger of a felonious attack or that his life was in danger. *Hartley v. State*, 168 Ga. 296, 147 S. E. 504.

The court's charge upon the subject of manslaughter is

not open to the criticism made upon it, when read in connection with the immediate context. *Hill v. State*, 164 Ga. 298, 138 S. E. 229. See also *Plymel v. State*, 164 Ga. 677, 139 S. E. 349; *Holland v. State*, 166 Ga. 201, 203, 142 S. E. 739.

Applied in *Brown v. State*, 168 Ga. 671, 148 S. E. 583.

Cited in *Salter v. The State*, 39 Ga. App. 13; *Fennell v. State*, 164 Ga. 59, 137 S. E. 762.

§ 67. (§ 67.) Involuntary manslaughter.

Death Caused by Speeding Involuntary Manslaughter.—

Where one operates an automobile upon a public street or highway of this State at a rate of speed penalized by statute, or while he is under the influence of intoxicating liquors, and, in consequence thereof, he kills a human being without any intention to do so, he is, under that view of the case most favorable to him, guilty of involuntary manslaughter. *Black v. State*, 34 Ga. App. 449, 130 S. E. 591.

The proviso in this section must be considered in connection with section 60 of the Penal Code, which defines murder. There can be no murder without malice express or implied. *Wright v. State*, 166 Ga. 1, 4, 141 S. E. 903.

Applied in *Cain v. State*, 39 Ga. App. 128, 130, 146 S. E. 340.

Cited in *Moreland v. State*, 164 Ga. 467, 139 S. E. 77.

§ 68. (§ 68.) Punishment.

Refusal to Charge to Consider Words or Threats not Error.—

It is not erroneous for the court, in instructing the jury on the law of voluntary manslaughter, as contained in this section, to fail or refuse to charge in immediate connection therewith the right of the jury to consider words, threats, or menaces in determining whether the circumstances attending the homicide were such as to justify the fears of a reasonable man that his life was in imminent danger or that a felony was about to be committed upon his person. *Brown v. State*, 36 Ga. App. 83, 135 S. E. 513.

§ 70. (§ 70.) Justifiable homicide.

Where this Section Governs Case, § 73 Excluded.—Where the law of justifiable homicide to prevent the commission of a felony upon the person of the slayer, as embraced in this section and section 71, is involved, it is error to limit the defense to justifiable homicide in a case of mutual combat as embraced in section 73. *Boatwright v. State*, 162 Ga. 378, 134 S. E. 91.

Charging with Sections 71 and 73.—In a proper case, on a trial of one indicted for murder, sections 70, 71, and 73 of the Penal Code may all be given in charge; but instructions as to the separate branches of the law of justifiable homicide should not be so given as to confuse the different defenses which may arise under those sections. *Little v. State*, 164 Ga. 509, 139 S. E. 37.

The portions of the charge complained of in this case, relating to the law of justifiable homicide under § 73, did not limit the defense under § 70, and did not confuse the separate defenses allowed the defendant under §§ 73 and 70. *Brown v. State*, 168 Ga. 282, 147 S. E. 519.

Cited in *Adams v. State*, 168 Ga. 530, 542, 148 S. E. 386; *Clinton v. State*, 37 Ga. App. 79, 80, 139 S. E. 82.

§ 71. (§ 71.) Fear must be reasonable.

Danger Apprehended Must Be Urgent and Pressing.—The doctrine of reasonable fear does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing. *Martin v. State*, 36 Ga. App. 288, 291, 136 S. E. 324.

Request for Instruction as to Reasonable Fears.—Where this section had been given in charge, if further instructions were desired, relating to the doctrine of reasonable fears as applicable to the case, there should have been appropriate written requests. *Paramore v. State*, 161 Ga. 166, 129 S. E. 772.

Instruction Properly Refused.—Requested instruction on reasonable fears as defense of homicide by shooting, properly refused. *Little v. State*, 166 Ga. 189, 190, 142 S. E. 674.

§ 72. (§ 72.) Killing in defense.

Application to Homicide of Officer.—The provisions of this section are not applicable to killing of an arresting officer

who shot at a fleeing automobile. *Howell v. State*, 162 Ga. 14, 30, 134 S. E. 59.

Cited in *Johnson v. State*, 39 Ga. App. 836, 838, 148 S. E. 610.

§ 73. (§ 73.) The danger must be urgent.

Section Applicable for Cases of Mutual Combat.—Where the law of justifiable homicide in cases of mutual combat is involved, the court should instruct the jury that the provisions of this section are applicable only in the event the jury find that the accused and the deceased were engaged in mutual combat. *Boatwright v. State*, 162 Ga. 378, 134 S. E. 91. See § 70.

On the trial of one indicted for murder, it is error to charge this section which is applicable only to a case of mutual combat, when there is neither evidence nor statement of the defendant tending to show that at the time of the homicide the deceased and the defendant were engaged in a mutual combat. There is no evidence in the present case to authorize such charge. *Lamp v. State*, 164 Ga. 57, 137 S. E. 765.

Applied in *Ellis v. State*, 166 Ga. 115, 142 S. E. 681; *Paraker v. State*, 37 Ga. App. 84, 139 S. E. 94.

Cited in *Andrews v. State*, 38 Ga. App. 701, 702, 145 S. E. 499.

§ 74. (§ 74.) Mutual protection.

Applied in *Chisholm v. State*, 162 Ga. 13, 132 S. E. 388.

§ 76. (§ 76.) Justifiable homicide not punished.

The failure of the court to charge the language of this section was not error in view of the other portions of the instructions actually given. *Hill v. State*, 164 Ga. 298, 138 S. E. 229.

ARTICLE 4

Rape

§ 94(a). Park's Code.

See § 94(1).

§ 94(1). Sexual intercourse with female under fourteen.

Burden of Proving Capacity to Consent.—A female over fourteen years of age is presumed to possess sufficient mental capacity to intelligently assent to or dissent from acts of sexual intercourse; and where in a rape case the contention of the State is that a woman above that age did not possess such intelligence, the burden rests upon the State to establish this fact. *Smith v. State*, 161 Ga. 421, 131 S. E. 163.

Intercourse with an Imbecile Constitutes Rape Regardless of Consent.—A man who has sexual intercourse with an imbecile female, who is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, though no more force is used than is necessary to accomplish the carnal act, and though the woman offer no resistance. *Smith v. State*, 161 Ga. 421, 131 S. E. 163.

Indictment for Rape—Verdict for Fornication Void.—Where one is tried on an indictment charging rape and drawn under this section, a verdict finding the accused guilty of fornication is null and void, and the judgment based thereon should be arrested on motion of the defendant. *Holland v. State* (this case), 161 Ga. 492, 131 S. E. 503. *Holland v. State*, 34 Ga. App. 824, 131 S. E. 923.

ARTICLE 5

Assault, and Assault and Battery

§ 95. (§ 95.) Definition of assault.

Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to

do so, will not amount to an assault. *Fennell v. State*, 154 Ga. 59, 63, 137 S. E. 762.

Opportunity but No Intention.—In this case there was unquestionably an opportunity to commit a violent injury on the person of the prosecutrix, but the facts entirely fail to show any intention on the part of the defendant to do so. *Godboul v. State*, 38 Ga. App. 137, 138, 142 S. E. 704.

§ 97. (§ 97.) Assault with intent to murder.

Effect of Section 115(1).—Section 115(1) of the Penal Code does not in any sense modify or repeal this section. *Gazaway v. State*, 34 Ga. App. 442, 444, 129 S. E. 888.

Intent Question for Jury.—The intent with which a shot is fired is a question for the jury. *Gazaway v. State*, 34 Ga. App. 442, 444, 129 S. E. 888.

Common Law Offense Adopted.—This section of the Penal Code was not intended to define what constitutes the offense of assault with intent to commit murder, nor to create a new statutory offense, but adopted the common-law offense of an aggravated assault with intent to commit murder, and changed the grade of the offense from that of a misdemeanor to that of a felony. *Wright v. State*, 163 Ga. 690, 148 S. E. 731.

The words "deadly weapon" in this section include all means or instrumentalities by which assaults with intent to commit murder may be made. *Wright v. State*, 168 Ga. 690, 148 S. E. 731.

§ 103. (§ 103.) Opprobrious words may be proved in defense.

Jury May Consider Conduct of Person Assaulted and Degree of Force Justified.—The jury may consider the actions and conduct of the person assaulted at the time of the assault, with other facts, in determining if force, and what degree of force, on the part of the defendant was justified, and if not justified, what, if any, effect should be given to such facts as in mitigation. *Hutchison v. Browning*, 34 Ga. App. 276, 129 S. E. 125.

Cited in *Chambers v. The State*, 39 Ga. App. 662, 148 S. E. 290.

ARTICLE 7

Kidnapping, and Industrial Home Children

§ 110. (§ 110.) Inveigling children.

Misapprehension as to the Age Is No Excuse.—The fact that the accused was ignorant of the girl's age, and that he believed, in good faith, and had good grounds to believe, that she was more than eighteen years of age, is no defense to an indictment under this section. *Smiley v. State*, 34 Ga. App. 513, 130 S. E. 359.

ARTICLE 9

Shooting at Another

§ 115. (§ 113.) Shooting at another.

Applied to officer shooting at an automobile in which the plaintiff was riding. *Copeland v. Dunahoo*, 36 Ga. App. 817, 822, 138 S. E. 267.

Effect of Section 115(1).—Section 115(1) of the Penal Code does not in any way modify or repeal this section. *Gazaway v. State*, 34 Ga. App. 442, 444, 129 S. E. 888. See annotation to § 115(1).

ARTICLE 9A

Shooting at Dwelling House

§§ 115(a), 115(b). Park's Code.

See § 115(1).

§ 115(1). Shooting at occupied dwelling prohibited; penalty.

Intent under this Section and Section 115.—The misdemeanor of unlawfully shooting into an occupied dwelling house under this section may be committed without an intention to maim or wound any person therein; but the intent to wound under section 115 is an essential element of the felony of unlawfully shooting at another. *Gazaway v. State*, 34 Ga. App. 442, 444, 129 S. E. 888.

Shooting at a Dwelling with Intent to Shoot at Another.—While it is a misdemeanor for any person to shoot at any occupied dwelling house, yet if, in addition to the essentials of that offense, the elements of unlawfully shooting at another or of assault with intent to murder are made to appear, the offender may be punished for the felony so shown. *Gazaway v. State*, 34 Ga. App. 442, 129 S. E. 888.

Effect of Section upon §§ 97, 115.—This section does not in any sense modify or repeal section 115, defining the offense of unlawfully shooting at another, or section 97, which defines the offense of assault with intent to murder. *Gazaway v. State*, 34 Ga. App. 442, 444, 129 S. E. 888.

ARTICLE 9B

Eavesdropper or "Peeping Tom"

§ 115(2). Unlawful to be eavesdropper or "Peeping Tom."

Applied in *Cobb v. Bailey*, 35 Ga. App. 302, 304, 133 S. E. 42.

ARTICLE 10

Abandonment of Child

§ 116. (§ 114.) Abandonment of child.

Under this section an indictment would be insufficient and bad if it failed to allege that such abandonment was wilful. *Carroll v. Aetna Life Ins. Co.*, 39 Ga. App. 78, 81, 146 S. E. 788.

If the child is fed at the mother's breast, and if the mother be abandoned by the father prior to the birth of the child, and if this abandonment of both the mother and the child continue after the birth, the child is abandoned by the father. *Chandler v. State*, 38 Ga. App. 362, 364, 144 S. E. 51.

The fact that the mother supplied the food, shelter and clothing is no legal defense to an accusation against the father under this section. *Chandler v. State*, 38 Ga. App. 362, 364, 144 S. E. 51.

ARTICLE 12

Blackmail and Threatening Letters

§ 118. (§ 116.) Blackmail defined.

Charge in the Language of Section.—An indictment which charges the offense of blackmailing substantially in the language of this section is not demurrable. *Beard v. State*, 36 Ga. App. 266, 136 S. E. 333.

Cited in *City Purchasing Co. v. Clough*, 38 Ga. App. 53, 142 S. E. 469.

ARTICLE 14

Interfering with Apprentices, Servants, Croppers, Farm Laborers, and Employees

§ 125. (§ 122.) Enticing, and attempting to entice away, a servant, cropper, or farm laborer.

Constitutionality.—This section is not violative of the constitution, § 6359. *Rhoden v. State*, 161 Ga. 73, 129 S. E. 640.

§ 131(a). Park's Code.

See § 115(2).

FIFTH DIVISION

Crimes Against the Habitations or Persons

ARTICLE 2

Burglary

§ 146. (§ 149.) Burglary defined.

Allegation as to Place of Business.—Where the house entered was not a “dwelling, mansion, or storehouse,” it must be alleged in the indictment that the house was a place of business where valuable goods were contained or stored. *Moody v. State*, 36 Ga. App. 284, 136 S. E. 464.

It is not essential that the house should be expressly denominated in the indictment as a “place of business,” if descriptive words are used sufficient to show that the house was used as a place of business of another. *Moody v. State*, 36 Ga. App. 284, 136 S. E. 464.

Same—Mere Existence of Valuable Goods Not Sufficient.—The mere fact that valuable goods were contained or stored therein is not alone sufficient to make the house a place of business, within the meaning of section. *Moody v. State*, 36 Ga. App. 284, 136 S. E. 464.

Church Building.—Whether an ordinary church building or edifice, appropriated to public worship, is subject to be burglarized, is not decided. *Moody v. State*, 36 Ga. App. 284, 136 S. E. 464.

A smokehouse within 65 feet of the owner's dwelling house and used by him as an outhouse and place for storing meat is among the buildings referred to in this section regardless of whether the smokehouse is within the same inclosure as the dwelling. *Moore v. State*, 34 Ga. App. 182, 129 S. E. 6.

SIXTH DIVISION

Crimes Relative to Property

ARTICLE 1

Robbery

§ 148. (§ 151.) Definition.

Request to Charge Definition of Robbery.—The omission to give in charge the definition of robbery as in this section is not error in the absence of request so to do. *Gore v. State*, 162 Ga. 267, 134 S. E. 36.

Larceny from the Person under § 172 and Robbery by Force Distinguished.—See *Smith v. State*, 38 Ga. App. 265, 143 S. E. 604.

§ 149. (§ 152.) By open force, punishment.

Charge of robbery upheld under the evidence in the case. *Watkins v. State*, 36 Ga. App. 297, 136 S. E. 815.

ARTICLE 2

Larceny

§ 168. (§ 171.) Receiving stolen goods.

Conviction of Principal Thief.—An indictment under this Ga.—18

section must allege that the principal thief has been indicted and convicted. *Ford v. State*, 35 Ga. App. 655, 134 S. E. 35².

The conviction of the principal is not an element in the crime defined in this section, but is a regulation which affects the time when or the manner in which a person indicted under said section can be tried. The gist of the offense created by this section is buying or receiving goods with the felonious knowledge that they were stolen. *Ford v. State*, 35 Ga. App. 655, 134 S. E. 353; 162 Ga. 422, 134 S. E. 95.

The record of the conviction of the principal thief is conclusive evidence of his conviction, but is merely prima facie evidence of his guilt; but the introduction of such record in evidence by the State places the onus upon the accessory of disproving the guilt of the principal. *Ford v. State*, 35 Ga. App. 655, 134 S. E. 353.

The accessory could waive the conviction of the principal and go to trial on the charge preferred against him. *Ford v. State*, 35 Ga. App. 655, 134 S. E. 353.

Applied in *Ford v. State*, 164 Ga. 638, 641, 139 S. E. 355.

§ 172. (§ 175.) Larceny from the person defined.

Larceny from the person under this section and robbery by force under § 148 are distinguished in *Smith v. State*, 38 Ga. App. 265, 143 S. E. 604.

§ 176. (§ 179.) Punishment.

Applied in *Tallent v. State*, 37 Ga. App. 84, 138 S. E. 917.

§ 183(1). Larceny of automobile, etc.

By this section the larceny of an automobile was made a felony; and any person convicted of this offense is punishable by imprisonment in the penitentiary for a time not longer than five years nor less than one year. By section 1068 of the Penal Code any person, upon second conviction for the larceny of an automobile, is punishable by imprisonment in the penitentiary for five years, which punishment is different from that imposed by this section for a first conviction of the larceny of an automobile; and this being so, the indictment for the second offense must allege the indictment and conviction of the accused for the first offense, and proof of such allegation must be made, before the accused can be subjected to the punishment prescribed in section 1068, the latter punishment being the maximum punishment prescribed under the above act. *Tribble v. State*, 168 Ga. 699, 148 S. E. 593.

§ 183½. Park's Code.

See § 183(1).

ARTICLE 3

Embezzlement and Fraudulent Conversions

§ 184. (§ 187.) Embezzlement by public officer.

Deposits of the public funds of the County of Fayette, in the Bank of Fayetteville as “the depository and disbursing agent” of said funds under the act of 1915 (Acts 1915, p. 233), creating a depository and disbursing agent of the public funds of the county, were general deposits, title to which became vested in such bank upon being deposited; and neither the depository nor its officers can be indicted for embezzlement of such funds as the property of the county. *Blalock v. State*, 166 Ga. 465, 143 S. E. 426.

§ 186. (§ 188.) Embezzlement by the bank or other corporate officers, servants, or stockholders.

Substitution of Stock of Less Value for Stock of More Value. — Where the corporate officer substituted certain stock of less value for other stock of more value, deposited as collateral security, with the intent to defraud, he was held guilty of embezzlement under this section. *Wilkins v. State*, 36 Ga. App. 743, 138 S. E. 253.

ARTICLE 5

Banks and Bank Officers.

§ 202(j). Park's Code.

See § 211(10).

§ 202(o). Park's Code.

See § 211(15).

§ 211. (10.) False entries.

Cited in *Manley v. State*, 166 Ga. 563, 582, 144 S. E. 170.

§ 211(15). Falsely advertising that deposits are insured.—Any officer, director, agent, or employee of any bank, who shall advertise by any office sign or upon any letterhead, billhead, blank note, receipt, certificate, circular, or on any written or printed paper that the deposits in said bank are insured or are guaranteed, unless such deposits are in fact insured or guaranteed in a manner satisfactory to the Superintendent of Banks and by his express permission, shall be guilty of a misdemeanor. Acts 1919, pp. 212, 214; 1927, pp. 195, 205.

Editor's Note.—This section prior to its amendment made the act of advertisement an offense in the event the deposits were not in fact insured or guaranteed. The phrase "in a manner satisfactory to the superintendent of Banks and by his express permission" did not then exist.

§ 202(t). Park's Code.

See § 211(20).

§ 211(20). Embezzlement.

This being a penal statute, it must be strictly construed. *Johnson v. State*, 166 Ga. 755, 144 S. E. 283.

The indictment charges that the defendant, "being an officer, director, agent, clerk, and employee of the Farmers Bank of Climax, Ga., did embezzle, abstract, and willfully misplace [misapply] the monies and funds of said bank, to and in the amount and value of the sum of \$20,000, with the intent to injure and defraud the bank." The word "funds" includes all the available assets of the bank, and therefore the charge complained of in the second special ground of the motion for a new trial is without merit. The defendant's conviction of the charge was authorized by the evidence, and no reversible error is shown by the special grounds of the motion for a new trial. *Johnson v. State*, 37 Ga. App. 129, 139 S. E. 118.

Under an indictment based on this section, charging the defendant with embezzlement of "moneys and funds" of a bank, he could not be convicted of the embezzlement of "notes, securities, or credits" of the bank; and the trial judge erred in giving to the jury an instruction which authorized them to convict the defendant of the embezzlement of notes, securities, or credits. *Johnson v. State*, 166 Ga. 755, 144 S. E. 283.

§§ 202(bb), 202(cc). Park's Code.

See §§ 211(28), 211(29).

§ 211(28). Bank insolvency deemed fraudulent.

Constitutionality.—This section does not violate the due-process clauses of the State and Federal constitutions. *Manley v. State*, 166 Ga. 563, 144 S. E. 170.

This provision, properly construed, does not deny the accused the right of asserting any and all other defenses appropriate in his case, and is not in violation of the state constitution section 6359. *Snead v. State*, 165 Ga. 44, 139 S. E. 812.

The act did not contain matter different from its caption. *Bitting v. State*, 165 Ga. 55, 139 S. E. 877.

The care and diligence required by this section is defined by law. It is "that ordinary care, skill, and diligence required of bailee for hire." Civil Code, § 3581. *Manley v. State*, 166 Ga. 563, 579, 144 S. E. 170.

Specifying and Proving Acts Causing Insolvency.—A presentment charging one who was in charge of the affairs of

a bank at and during the time it became insolvent with the offense of fraudulent insolvency need not allege or specify the acts which caused the insolvency. The presumption that the failure and insolvency of the bank was fraudulent is rebuttable; but *res ipsa loquitur*. *Snead v. State*, 165 Ga. 44, 139 S. E. 812.

In view of the prima facie presumption of a fraudulent insolvency, which arises from the failure of a bank, that such failure is due to the fraudulent mismanagement of the officers having the same in charge, a presentment charging this offense is *sui generis*, and it does not devolve upon the prosecution to allege, nor to prove in the first instance anything more than the fact that the bank became insolvent while under the management and control of the accused and during the period of time that he was in charge of the affairs of the bank. *Snead v. State*, 165 Ga. 44, 139 S. E. 812.

Juror Related to Depositor.—Upon the trial of one indicted under this section a person related within the prohibited degrees to a depositor in the bank is disqualified to act as a juror in the case. *Snead v. State*, 38 Ga. App. 797, 145 S. E. 918.

Evidence held admissible in indictment under this section in *Bitting v. State*, 165 Ga. 55, 139 S. E. 877.

§ 211(29). Receiving deposits after insolvency.

Where a cashier of an insolvent bank, having charge and control of the bank, and having knowledge of its insolvency, receives money on general deposit in the bank, and thereby loss or injury results to the person who made the deposit, the cashier is guilty of a felony, under the provisions of this section. *Lenhardt v. State*, 37 Ga. App. 41, 138 S. E. 590.

§ 202(hh). Park's Code.

See § 211(34).

§ 211(34). Check or draft without funds.

Where in a prosecution under this section, it appears from the evidence that the transaction amounted merely to a promise by the giver of the check to pay in the future, a conviction is not warranted. *Highsmith v. State*, 33 Ga. App. 192, 143 S. E. 445.

ARTICLE 11

Firing the Woods

§ 227. (§ 229.) Who may.—No person but a resident of the county where the firing is done, owning lands therein, or domiciled thereon, outside of any town incorporation, shall set on fire any woods, lands, or marshes, nor shall such persons, except between the first of January and the first of March annually. Cobb, 824; 1927, p. 144.

Editor's Note.—By the amendment of 1927, the date contained in the excepting clause was changed from February 20, April 1, to January 1, March 1.

SEVENTH DIVISION

Forgery, Counterfeiting, and Unlawful Currency

ARTICLE 1

Forgery, Counterfeiting, and Unlawful Currency

§ 231. (§ 233). Forging official certificates, etc.

Where Forged Instrument Composed of Two Parts. —

Clause 7 applied in *Johnson v. State*, 36 Ga. App. 310, 136 S. E. 329, notwithstanding that the forged instrument was composed of two parts, the other part being treated as surplusage.

Cited in dissenting opinion in *Stanley v. Beavers*, 164 Ga. 702, 139 S. E. 344.

§ 239. (§ 237.) Bank check or draft.

Cited in dissenting opinion in *Stanley v. Beavers*, 164 Ga. 702, 139 S. E. 344.

§ 247. (§ 245). Using fictitious names.

This section is not void on the ground that it is unreasonable and uncertain; nor is it in violation of § 6700. *Nissenbaum v. State*, 167 Ga. 495, 146 S. E. 189.

A "bill of exchange," within the meaning of this section, is set out in the indictment in this case, which charges that the accused "did unlawfully, feloniously, and fraudulently make and draw a certain bill of exchange in the fictitious name of J. W. Ellison, as cashier of the Corn Exchange Trust Co., of Chicago, Illinois, being in form and substance as follows, to wit: 'The Corn Exchange Trust Co., Chicago, Illinois. No. 4025. Nov. 30, 1927. Pay to the order of Abe Greenberg \$1500.00. Fifteen hundred dollars. Cashier's Check. J. W. Ellison, Cashier.'" *Nissenbaum v. State*, 38 Ga. App. 253, 143 S. E. 776.

§ 248. (§ 246.) Personating another.

Cited in dissenting opinion in *Stanley v. Beavers*, 164 Ga. 702, 139 S. E. 344.

§ 249. (§ 247.) Obtaining goods, etc., on false writings.

An indictment under this section, which fails to charge an intent to defraud, is fatally defective. *Sims v. State*, 37 Ga. App. 819, 142 S. E. 464.

Cited in dissenting opinion in *Stanley v. Beavers*, 164 Ga. 702, 139 S. E. 344.

DIVISION 7A

Fictitious or Trade-Name in Business

§ 258(1). Unlawful use of fictitious or trade-name; affidavit giving true-name, etc.—It shall be unlawful for any person, persons, or partnership to carry on, conduct, or transact any business in this State under an assumed, fictitious, or trade-name, or under any other designation, name, or style, other than the real name or names of the individual or individuals conducting or transacting such business, unless said person, persons, or partnership shall file, in the office of the clerk of the superior court in each county in which said person, persons, or partnership shall maintain an office or place of business, an affidavit signed by said person or persons, setting forth the full name or names and the address or addresses of the true owner or owners of said business. Acts 1929, p. 233, § 1.

§ 258(2). Time for filing affidavit; affidavit on change of ownership of business.—Any person, persons, or partnership now conducting a business under an assumed, fictitious, or trade-name shall file such affidavit within thirty days after this act shall take effect, and any person, persons, or partnership acquiring or hereafter undertaking to conduct a business under an assumed, fictitious, or trade-name shall file said affidavit be-

fore doing any business under such assumed, fictitious, or trade-name; and whenever there is any change of ownership of a business conducted under any assumed, fictitious, or trade-name, an affidavit as herein provided for shall be filed, showing the full name or names and address or addresses of the new owner or owners of such business. Acts 1929, p. 233, § 2.

§ 258(3). Alphabetical index of affidavits; fee of clerk.—The clerk of the superior court in each county shall keep an alphabetical index of all such affidavits filed in his office, said index to be kept under the assumed, fictitious, or trade-name, and said clerk shall keep a permanent file of all such affidavits filed in his office, both index and file to be open to public inspection. The clerk of the superior court shall receive a fee of fifty cents for recording and indexing each such affidavit. Acts 1929, p. 234, § 3.

§ 258(4). Corporation legally doing business under its corporate name, not affected.—Nothing in this Act is to be construed to affect or apply to any corporation duly organized under the laws of this State or any foreign corporation legally doing business in this State under its corporate name. Acts 1929, p. 234, § 4.

§ 258(5). Violation of Act, a misdemeanor.—Any violation of this Act shall be a misdemeanor and upon conviction the offender shall be punished as for a misdemeanor. Acts 1929, p. 234, § 5.

EIGHTH DIVISION

Crimes against the Public Justice and Official Duty

ARTICLE 5.

Obstructing Legal Process, and Sentence or Order of Court

§ 311. (§ 306). Obstructing legal process.

See notes to C. C. § 4643.

Allegation as to Serving of Lawful Process.—An indictment or accusation based upon this section, which does not allege that the officer was attempting to serve or execute a lawful process or order, is fatally defective. *Prichard v. State*, 34 Ga. App. 181, 129 S. E. 12.

ARTICLE 6

Rescues and Escapes

§ 319. (§ 314.) Penalty for escapes in misdemeanor cases.

See notes to § 1152.

This section refers only to persons convicted in State courts and not to those convicted in the Federal courts who may be imprisoned, under the authority of United

States officials, in State jails. This is true notwithstanding the provision of section 1152 of the Penal Code. *Brandon v. State*, 37 Ga. App. 495, 141 S. E. 63.

ARTICLE 8

Receiving, Harboring, or Concealing Guilty Persons, and Compounding Crimes and Penalties

§ 326. (§ 321). Receiving, harboring, guilty person.

Concealing Body of Murdered Person.—Where A, knowing that B is guilty of murder, assists B in concealing the crime and the body of the murdered person, A is not thereby guilty of “receiving, harboring, or concealing” the murderer, within the meaning of this section. *Heath v. State*, 34 Ga. App. 218, 128 S. E. 914.

ARTICLE 11

Appointment of Peace-Officers and Detectives

§ 339(334). Other offenses against public justice.

Section Adopts Offenses Punishable at Common Law.—This section and section 366 only adopts and make crimes in this state offenses against public justice or against the public peace which were punishable as such at common law. *Prichard v. State*, 34 Ga. App. 181, 129 S. E. 12.

ARTICLE 12

Interfering with Board of Public Welfare

§ 339(a). Park’s Code.

See § 339(1).

§ 339(1). Interference with inspection; refusing access to records.

Obstructing Officer Arresting without Warrant.—Under this section and section 366, a third person can not be punished for resisting or obstructing an officer in this state who is attempting, without a warrant, to arrest another for a violation of the prohibition law of this state. *Prichard v. State*, 34 Ga. App. 181, 129 S. E. 12.

NINTH DIVISION

Crimes against the Public Peace and Tranquility

ARTICLE 3

Carrying Concealed Weapons; Carrying Weapons to Courts, Election Grounds, etc. Pointing Weapon at Another, and Furnishing Weapons to Minors

§ 348(a). Park’s Code.

See § 348(1).

§ 348(1). Carrying pistols without license, prohibited.

Applied in *Fanning v. State*, 39 Ga. App. 531, 147 S. E. 788.

§ 349. (§ 343.) Pointing weapon at another.

Evidence held to show that gun was pointed in violation of this section in *Stapler v. State*, 38 Ga. App. 33, 34, 142 S. E. 570.

ARTICLE 6

Unlawful Assemblies, Riots and Affrays

§ 360. (§ 354.) Riot.

All persons connected with and sharing in the common purpose of the assembly were guilty of riot, whether their conduct was violent and tumultuous or not. *O’Quinn v. State*, 39 Ga. App. 829, 830, 148 S. E. 618.

ARTICLE 8

Other Offenses against Public Peace

§ 366. (§ 375.) Other offenses against public peace.

This section is sufficiently broad in its terms to authorize the punishment of any offense which was an offense at the common law against the public peace, and punishment of which is not provided for in the Penal Code. *Faulkner v. State*, 166 Ga. 645 665, 144 S. E. 193. See annotation to section 339.

TENTH DIVISION

Offenses against Public Morality and Decency, Public Health, Public Safety and Convenience, Public Trade, Public Policy, Suffrage, Public Police

ARTICLE 5

Seduction

§ 378. (§ 387.) Seduction, and punishment.

Erroneous instruction on this subject in *Joiner v. State*, 37 Ga. App. 487, 140 S. E. 799.

ARTICLE 6A

Soliciting for Purpose of Prostitution

§ 384(a). Park’s Code.

See § 384(1).

§ 384(1). Soliciting and procuring unlawful; penalty.

The indictment in this case, which charged the accused with having transported a named woman in an automo-

bile from her home in Gordon county in this State to a hotel and room, in a named place in the State of Tennessee, for the immoral purpose of having sexual intercourse with her, was not subject to the demurrer. *Hightower v. State*, 39 Ga. App. 674, 148 S. E. 300.

ARTICLE 7

Obscene Pictures, and Abusive and Vulgar Language.

§ 387. (§ 396.) Using abusive or obscene language.

Applied in *Cumbie v. State*, 37 Ga. App. 9, 138 S. E. 524.

ARTICLE 8

Gaming-Houses, Gaming-Tables, and Gambling.

§ 389 (§ 398). Gaming-houses.

Cited in *Fenner v. Boykin*, 3 Fed (2d), 674, 678.

ARTICLE 9

Lotteries, Gift Enterprises, Dealing in Futures, and Trading-stamps

§ 397. (§ 406). Lottery tickets.

Punchboard constituting gambling device under this section. See *Hobbs v. K. & S. Sales Co.*, 35 Ga. App. 226, 230, 132 S. E. 775.

§ 398. (§ 407). Carrying on a lottery.

See annotation to preceding section.

§ 403.—Repealed by Acts of 1929, p. 245, § 8. See § 4264(8).

ARTICLE 11

Minors Not to Play Billiards, Pool, or Ten-Pins Without Consent of Parents, etc., Regulation of Billiard Rooms.

§ 406(2). Violation by licensee of regulations governing billiard rooms.

Cited in *Shaver v. Martin*, 166 Ga. 424, 426, 143 S. E. 402.

ARTICLE 12

Human Bodies, Embalming Illegally, Arbitrary Burial Regulations, and Cemeteries

§ 408. (§ 415). Illegal removal from grave.

Disinterment with Consent of the Relatives.—This section

does not apply in cases in which the disinterment is done by and with the consent of relatives entitled to control the burial and disposition of the bodies. *Fairview Cemetery Co. v. Wood*, 36 Ga. App. 709, 720, 138 S. E. 88.

§ 410. (§ 417). Disenterring by coroner without good grounds.

When a claim is presented to the ordinary to audit under this section, and he allows it and issues to the claimant a warrant on the county treasurer for its payment, the claim becomes liquidated. It then becomes the duty of the county treasurer on whom the warrant is drawn to pay it. If the treasurer is in funds and refuses to pay the warrant, he can be compelled by mandamus to do so. *Maddox v. Anchor Duck Mills*, 167 Ga. 695, 698, 146 S. E. 551.

ARTICLE 13

Disturbing Divine Service, or Societies, Violating the Sabbath, Intruding on Camp-grounds, Disturbing Schools, Dance-Halls

§ 416. (§ 422). Violating the Sabbath Day.

In the light of modern-day methods of traveling by automobile, the motor-power of which is derived from the use of gasoline, and in the light of the present-day use to which automobiles are put, the sale of gasoline on the Sabbath is a "work of necessity" within the contemplation of this section. *Williams v. State*, 167 Ga. 160, 144 S. E. 745; 38 Ga. App. 694, 145 S. E. 483.

It is, in every prosecution based upon this section of the code, incumbent on the State to allege and prove that the acts done by the accused in the course of his ordinary calling were not works of necessity or charity. *Brown v. State*, 38 Ga. App. 209, 143 S. E. 439.

§ 419(1). Dancing in public places on Sunday.

Constitutionally.—The act which enacted this and the following section is not unconstitutional as violative of § 6437. *Durden v. State*, 161 Ga. 537, 131 S. E. 496.

§ 425(a). Park's Code.

See §§ 419(1), 419(2).

ARTICLE 14

Manufacture and Sale of Intoxicants, and Regulations as to Liquors, and Substitutes for Intoxicants

§ 442. Drunkenness in public places.

Acquittal as Bar.—Acquittal under this section was no bar to a conviction on an indictment under section 528(21). *Smith v. State*, 34 Ga. App. 601, 130 S. E. 219.

Evidence held not authorizing conviction under this section. *Chandler v. State*, 36 Ga. App. 121, 135 S. E. 494.

ARTICLE 14A

Manufacturing, Selling, Keeping, etc., of Prohibited Liquors and Beverages

§§ 448(b), 448(c). Park's Code.

See §§ 448(2), 448(3).

§ 448(2). Definition of prohibited liquors, what embraced in.

This section is constitutional. *Young v. State*, 167 Ga. 165, 166, 144 S. E. 726.

In view of the provisions of the statute in question, which includes, among other beverages the sale or possession of which is prohibited, all malted or fermented liquors and beverages in which maltose is a substantial ingredient, whether alcoholic or not, or whether intoxicating or not, ground 2 of the demurrer is without merit; the attack on the indictment in that ground being that "the bill of indictment, while professing to charge and accuse the defendant with possessing certain liquors and beverages, does not set out that the said liquors and beverages are intoxicating or that they are alcoholic." *Young v. State*, 167 Ga. 165, 144 S. E. 726.

§ 448(3). Prohibited acts specified.

General Verdict Supported Only by One Court out of Two.—It is error to refuse a new trial where an accusation contained two counts, the first charging a sale of whisky, and the second charging possession of whisky, both charges growing out of the same transaction, where upon the trial the evidence authorizes a conviction upon the second count only and the verdict is a general verdict of guilty. *Simmons v. State*, 162 Ga. 316, 134 S. E. 54.

ARTICLE 14D

Subsequent Prohibitions and Regulations of Intoxicating Liquors

§ 448(vvv). Park's Code.

See § 448(36).

§ 448(36). Unlawful to carry, receive, or possess specified liquors.

Evidence Not Warranting Allegation.—Where a proceeding is instituted under this act, to condemn an automobile alleged to have been used in conveying intoxicating liquors over a designated public road, and the evidence does not demand a finding that the vehicle was used in conveying liquors "on the public roads named in the petition," the direction of a verdict "for confiscation is reversible error." *Wells v. State*, 33 Ga. App. 426, 126 S. E. 856; *Citizens Auto Co. v. State*, 35 Ga. App. 166, 132 S. E. 258.

§ 448(oooo). Park's Code.

See § 448(54).

§ 448(54). Contraband articles; destruction, sale and proceeds.

Verdict Directed Not Warranted by Evidence Reversible.—Where a proceeding is instituted under this section, to condemn an automobile alleged to have been used in conveying intoxicating liquors over a designated public road, and the evidence does not demand a finding that the vehicle was used in conveying liquors "on the public roads named in the petition," the direction of a verdict "for confiscation" is reversible error. *Citizens Auto Co. v. State*, 35 Ga. App. 166, 132 S. E. 258.

Burden of Proof upon the State.—In a proceeding under this section, to condemn a vehicle or conveyance used in transporting liquor, the sale or possession of which is prohibited by law, the burden is upon the State, the condemner, to show that the vehicle or conveyance was used in conveying the prohibited liquors or beverages with the knowledge of the owner or lessee. *Seminole Securities Co. v. State*, 35 Ga. App. 723, 134 S. E. 625.

Owner Has No Right to Replevy.—This section does not contain any provision authorizing the owner or lessee of the vehicle or conveyance seized under the provisions of the statute to replevy and take possession of the property by giving a bond of any description to the sheriff after the property has been seized. *Commercial Credit Co. v. Johnson*, 166 Ga. 316, 143 S. E. 377.

Injunction Against Sale Where Notice Not Given.—Where an automobile is sought to be condemned and sold for transporting whisky, under this section without notice to any one except the person in possession of the automobile, the real owner of the automobile, who has not been served with notice of the condemnation proceedings, can have such sale enjoined against the sheriff and solicitor of the court seeking to sell the automobile; and the judge did not err, under the pleadings and the evidence, in granting a temporary injunction. *Betts v. Commercial Credit Co.*, 165 Ga. 119, 120, 139 S. E. 860.

ARTICLE 15

Vagrants

§ 449. Vagrancy defined.

Proof That Accused Was Able to Work.—A conviction of vagrancy under this section is unauthorized where there is no proof that the accused was able to work. *Bryant v. State*, 34 Ga. App. 523, 130 S. E. 352.

Charge as to Age.—Failure to charge the jury that to convict the defendants the evidence should show that they were more than sixteen years of age, is not error, it not appearing from the motion for a new trial, or from the evidence, that either of the defendants was not of that age. *Shank v. State*, 36 Ga. App. 301, 136 S. E. 332.

ARTICLE 17B

Sales of Securities

§ 461(8). Unlawful sale, etc., of certain securities.

The sale of bonds payable in one year from the date of their issue is no offense, under the Georgia securities law. *Taylor v. State*, 34 Ga. App. 4, 128 S. E. 228.

§ 461(11). Selling Class "D" securities without license; advertisements of illegal sales.

Constitutionality.—So much of this section as makes it a felony for an issuer of securities falling within class D to sell or offer to sell, etc., is unconstitutional as violative of section 6437. *Smiths v. State*, 161 Ga. 103, 129 S. E. 766.

ARTICLE 18

Illegal Practice of Professions, Carrying on Business, and Medical College Diplomas

§ 464(1). Cigarettes and cigars; penalty for failure to pay tax.

Applied in *McMath v. State*, 39 Ga. App. 541, 147 S. E. 899.

§ 464(4). Failure to cancel stamps.—Whoever makes use of any adhesive stamp to denote any tax imposed by this Act, without cancelling or obliterating such stamps as hereinafter provided, shall be guilty of a misdemeanor, and upon conviction shall be punished as hereinafter provided. That whenever an adhesive stamp is used for denoting any tax imposed by § 993(308) et seq. of the Civil Code Act, except as hereinafter provided, the person using or affixing the same shall cancel same, so that the same may not again be used, and stamps shall be affixed in such manner

that their removal will require continued application of steam or water. Acts 1929, p. 77, § 1.

§ 464(5). Alteration and other things made penal.—Whoever wilfully removes or alters the cancellation or defacing marks of said adhesive stamp, with intent to use or cause the same to be used after it has already been used, or knowingly or wilfully buys, sells, offers for sale, or gives away any such washed or restored stamp, or knowingly uses the same, knowingly or wilfully prepares, buys, sells, offers for sale, or has in his or its possession any counterfeit stamps, is guilty of a misdemeanor, shall be punished as hereinafter provided. Acts 1929, p. 77, § 2.

§ 464(6). Defeating or hindering operation of law, a misdemeanor.—Any person, firm, or corporation subject to this tax, engaging in or permitting such practices as are prohibited by law, with intent to defeat provisions of § 993(308) et seq. of the Civil Code, or if any person, firm, or corporation, agent or officer thereof, who shall, upon demand of any officer or agent of the Department of Revenue of said State, refuse to allow full inspection of the premises or any part thereof, or who shall hinder or delay or prevent such inspection when demand is made therefor, shall be deemed to be guilty of a misdemeanor, and shall, upon conviction, be punished as hereinafter provided. Acts 1929, p. 77, § 3.

§ 464(7). Penalty for engaging in business without license.—Any person, firm, or corporation engaging in the business of buying, selling, or distributing within this State cigars or cigarettes, without having secured the required license from the Commissioner of Revenue, shall be guilty of a misdemeanor, and, upon conviction by a court of competent jurisdiction, shall be punished, as hereinafter provided. Acts 1929, p. 79, § 6.

§ 464(8).—Used stamps; possession, use of, etc., a misdemeanor.—Whoever wilfully removes or otherwise prepares any adhesive stamp, with intent to use, or cause the same to be used, after it has already been used, or knowingly or wilfully buys, sells, offers for sale, or gives any such washed or restored stamps to any person, or knowingly uses the same, or has in his possession any washed, restored, or altered stamp which has been removed from the articles to which it has previously been affixed, or whoever, for the purpose of indicating the payment of any tax hereunder, reuses any stamp which has heretofore been used, for the purpose of paying any tax provided in §§ 993(308) et seq. of the Civil Code, or whoever, buys, sells, offers for sale, or has in his or its possession any counterfeit stamps, is guilty of a misdemeanor, and upon conviction shall be punished as hereinafter provided. Acts 1929, p. 80, § 9.

§ 464(9). Penalty for violation of Act.—Violation of any of the provisions of the preceding sections, providing for punishment shall constitute a misdemeanor and punishable as such, except that the fine shall not be less than twenty-

five (\$25.00) dollars for each offense. Acts 1929, p. 80, § 10.

§ 476(13). Motor fuel distributors; penalty.—Any distributor who shall fail to register, or make monthly returns, or give bond, or pay the tax, as herein provided, or who shall fail to do any other act in sections 993(293) to 993(300) of the civil code required, shall be guilty of a misdemeanor and shall be punished as provided in section 1065 of the Penal Code of Georgia. Acts 1927, p. 108.

Editor's Note.—Section 476(12) of the code upon the same subject, simply provides a punishment for violation of §§ 993(164)-993(168) relative to occupation tax levied on motor-fuel distributors.

§ 476(f). Park's Code.

See §§ 464(1), 464(2).

ARTICLE 23A

Vital Statistics

§§ 503(8) and 503(9). Superseded by the Acts of 1927 pp. 353 et seq., herein codified as § 503 (10).

§ 503 (10). Violation of vital statistic law by any person.—Any person who, for himself or for an officer, agent, or employee of any other person or of any corporation or partnership, (a) shall inter, cremate, or otherwise finally dispose of a dead body of a human being, or permit the same to be done, or shall remove such body from the primary registration district in which the death occurred or the body was found, without the authority of a burial or removal permit issued by the local registrar of the district in which the death occurred or in which the body was found, or (b) shall refuse or fail to furnish correctly any information in his possession, or shall furnish false information affecting any certificate of record, required by this Act, or (c) shall wilfully alter otherwise than is provided by section 1681(43) or shall falsify any certificate of birth or death, or any record established by §§ 1681(27) to 1681(46) or, (d) being required by §§ 1681(27) to 1681(46) to fill out a certificate of birth or death and file the same with the local registrar, or deliver it upon request, to any person charged with the duty of filing the same, shall fail, neglect or refuse to perform such duty in the manner required by §§ 1681(27) to 1681(46) or, (e) being a local registrar or deputy registrar, shall fail, neglect, or refuse to perform his duty as required by §§ 1681(27) to 1681(46) shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for the first offense be fined not less than five dollars nor more than fifty dollars, and for each subsequent offense not less than ten nor more than one hundred dollars, or be imprisoned in the county jail not more than sixty days, or be both fined and imprisoned in the discretion of the court. Acts 1927, p. 369.

§ 503(11) Enforcement of vital statistic law.—

Each local registrar is hereby charged with strict and thorough enforcement of the provisions §§ 1681(27) to 1681(46) in his registration district, under the supervision and direction of the State Registrar, and he shall make an immediate report to the State Registrar of any violation of this law coming to his knowledge, by observation or upon complaint of any person, or otherwise. The State Registrar is hereby charged with the thorough and efficient execution of the provisions of said sections in every part of the State, and is hereby granted supervisory power over local registrars and deputy local registrars, to the end that all its requirements shall be uniformly complied with. The State Registrar, either personally or by an accredited representative, shall have authority to investigate cases of irregularity or violation of law, and all registrars shall aid him upon request in such investigations. When he shall deem it necessary, he shall report such cases of violations of any of the provisions of sections above referred to, to the prosecuting attorney of the county, with the statement of the facts and circumstances; and when any such case is reported to him by the State registrar, the prosecuting attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the person or corporation responsible for the alleged violation of law. And upon request of the State Registrar, the Attorney-general shall assist in the enforcement of the provisions of said sections. Acts 1927, pp. 369, 370.

ARTICLE 24

The Public Safety

§ 517. (§ 515.) Trains must stop within fifty feet of each railroad crossing.

Violation as Negligence at Highway Crossing.—The purpose of this section is to prevent collisions of trains and cannot be invoked by a private individual in a suit for injuries sustained at a railway and highway crossing for the purpose of showing negligence because the engine failed to stop before crossing the track of a nearby intersecting railroad. Central, etc., R. Co. v. Griffin, 35 Ga. App. 161, 132 S. E. 255.

§ 518(a). Park's Code.

See § 518(1).

§ 518(1). Penalty for not erecting blow-posts.

See notes under sections 2677(1) et seq., citing Lima-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

§ 519(a). Park's Code.

See § 519(1).

§ 519(1). Penalty for breach of duty by engineer.

See notes under sections 2677(1) et seq., citing Lima-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

§ 526(1). Automatic fire-box door required.

Validity.—The case of Napier v. Atlantic Coast Line R.

Co., 272 U. S. 605, affirmed 2 Fed. (2d) 891, as annotated under this catchline in Ga. Code of 1926.

§ 528(c). Park's Code.

See § 528(2).

§ 528(2). Violating Civil Code §§ 1770(1)-1770(20) regulating motor vehicles.

Effect of Acquittal for Drunkardness upon Prosecution.—Acquittal on an indictment under P. C. section 442 charging the defendant with having appeared in an intoxicated condition on a public highway, which intoxication was made manifest by boisterousness and indecent condition and acting, and by vulgar, profane, and unbecoming language, was no bar to a conviction on an indictment under this act, charging the defendant with having operated an automobile on the public highway while in an intoxicated condition. Smith v. State, 34 Ga. App. 601, 130 S. E. 219.

§ 528(3). Violating Civil Code §§ 1770(2)-1770(48) regulating motor vehicles.

Constitutionality.—The title of the act is broad enough to authorize the provision making penal the use of a number-plate not furnished by the Secretary of State. This provision was germane to the object of the act, directly tending to make the provisions of the act effective. Lee v. State, 163 Ga. 239, 135 S. E. 912.

§ 528(4). Violating Civil Code §§ 1770(50)-1770(60) regulating motor vehicles.

Constitutionality.—So much of the motor-vehicle act of 1921 as undertakes to make penal the failure of the operator of a motor-vehicle, when meeting a vehicle approaching in the opposite direction, to "turn his vehicle to the right so as to give one half of the traveled roadway, if practicable, and a fair opportunity to the other to pass by without unnecessary interference," is too uncertain and indefinite in its terms to be capable of enforcement. Heath v. State, 36 Ga. App. 206, 136 S. E. 284.

A defendant could not lawfully be convicted upon such charges. Hale v. State, 21 Ga. App. 658, 94 S. E. 823; Heath v. State, 36 Ga. App. 206, 136 S. E. 384; Shupe v. State, 36 Ga. App. 286, 287, 136 S. E. 331.

§ 528(e). Park's Code.

See § 528(7).

§ 528(7). Unlawful dealings in motor vehicles.

Applied in Goodwyne v. State, 38 Ga. App. 183, 143 S. E. 443.

§ 528(j). Park's Code.

See § 528(4).

§ 528(1). Park's Code.

See § 526(1).

ARTICLE 34

Game

§ 594(d-1). Park's Code.

See § 594(1).

§ 594(1). Open season.—The following is established as the lawful open season for hunting birds and animals in Georgia, to-wit: Quail, Wild Turkeys, and Plovers, from November 20th to March 1st, inclusive; Doves, from October 16th to January 31st, inclusive; Woodcock and Sum-

mer or Wood Duck, from September 1st to January 1st; Snipe, from November 1st to January 31st; Marsh Hens, from September 1st to November 30th; Deer, from November 1st to December 31st, inclusive; Cat Squirrel, from November 20th to March 1st.

Any person who shall hunt, kill or destroy by any means whatever, or who has in his possession any of the above named birds or animals, except between the respective dates above specified shall be guilty of a misdemeanor. Provided however, that the open season for hunting cat squirrel in such counties of the State of Georgia as have a population of not less than 12,100 and not more than 12,123 as determined by the census of the United States of 1920, shall be from September 15th, to January 1st, inclusive. Acts 1925, pp. 302, 303; Acts 1929, p. 272, § 1.

§ 594(3a). Unlawful to kill deer in certain counties.—It shall be unlawful for any person to kill, shoot, or hunt deer in the counties of Dade, Walker, Catoosa, Murray, Fannin, Rabun, White, Chattooga, Whitfield, Gordon, Gilmer, Towns, Dawson, Union, Habersham, Lumpkin, Pickens, and Stephens, until five (5) years after the passage of this Act.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished as prescribed in section 1065 of the Penal Code. Acts 1929, p. 271, § 1.

§ 594(3b). Dove hunting.—It shall be unlawful to hunt doves in the State of Georgia except during the month of September and between November 20th and January 31st, inclusive.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished as prescribed in section 1065 of the Penal Code of Georgia. Acts 1929, p. 271, § 1.

§ 594(7a). Open season for fur-bearing animals in counties of 23,600 to 23,890 population; proviso.—Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that it shall be unlawful for any person or persons, in counties of not less than 23,600 nor more than 23,890 according to the census of the United States for the year 1920, to capture any mink, otter, beaver, bear, wildcat, muskrat, skunk, raccoon, opossum, and fox or any other fur-bearing animals by means of traps, deadfalls, or other similar devices, or to set or use any traps, deadfalls or other similar devices for the purpose of capturing any of said fur-bearing animals, between November 20th and the last day of February, inclusive; provided, however, that it shall not be unlawful to catch foxes and kill skunk, wildcats, and other fur-bearing animals by means not herein prohibited; that any person who shall violate any of the above or foregoing laws or provisions of this section shall be guilty of misdemeanor, and shall be punished as provided by the Penal Code of Georgia in misdemeanor cases. Acts 1929, p. 244, § 1.

§ 594(h-1). Park's Code.

See § 594(13).

§ 594(13). False statement in application for trapper's license.—Any person making false statements in an application for a trapper's license shall be guilty of a misdemeanor. Acts 1929, p. 333, § 1.

See note to § 2158(30¼), C. C.

§ 594(13a). Buying hides for resale.—Any person, firm, or corporation who shall buy any hides or pelts of fur-bearing animals for the purpose of resale, without first procuring the license required by this Act, shall be guilty of a misdemeanor, and shall be punished as provided for in section 1065 of the Penal Code of Georgia. Acts 1929, p. 334, § 2.

§ 594(13b). Unlawful trapping.—It shall be unlawful for any person, firm, or corporation to use a steel trap or other like device, in trapping or catching any bird, game, or animal in any of the counties of this State, whether same be caught or trapped for profit or otherwise. But this Act shall not apply to the salt-water marshes and the islands along the coast of Georgia; provided, however, that the Commissioner of Game and Fish may issue special permits to game wardens, deputies, or other responsible persons, authorizing the taking, by means of steel traps, of vermin and predatory animals in localities where such vermin or predatory animals are a menace to quail or other game birds, and each steel trap used for this purpose must have securely fastened thereto a tag issued by the Department of Game and Fish, showing authority for its use. Acts 1929, p. 335, § 1.

§ 594(13c). Traps and devices to protect fowls, not prohibited, when.—Any person, firm, or corporation shall not be prohibited from using steel traps or other like devices for the purpose of protecting fowls, provided said steel traps or other like devices shall not be set or placed at a distance greater than one hundred feet from said fowl-house; and provided further, that said fowl-house is located within the curtilage of the dwelling-house of said person, firm, or corporation. Acts 1929, p. 335, § 2.

§ 594(13d). Misdemeanor; punishment. — Any person, firm, or corporation found guilty of the violation of the provisions of this Act shall be deemed guilty of a misdemeanor, and shall be punished as provided in section 1065 of the Penal Code of Georgia. Acts 1929, p. 336, § 3.

ARTICLE 35

Terrapins, Turtles, Fishing, and Oysters

§ 612. Closed period; seines, nets, gigs, spears.

Applied in *Camp v. State*, 34 Ga. App. 591, 130 S. E. 606.

§ 621(bb). Park's Code.

See § 2158(24), C. C.

§ 628(b). Park's Code.

See § 461(8).

§§ 628(d), 628(h.) Park's Code.

See § 461(11).

ARTICLE 39

Emigrant Agents

§ 632. (§ 601.) Acting as emigrant agent without license.—Any person who shall solicit or procure emigrants, or shall attempt to do so, without first procuring a license as required by law, shall be guilty of a misdemeanor. An emigrant agent is a person who shall solicit or attempt to procure labor in this State to be employed beyond the limits of the same. An emigrant is any person who has been solicited, persuaded, enticed, or employed to leave the State to the employed or worked beyond the limits of the same. Acts 1929, p. 176, § 632.

The word "emigrants," does not apply to persons who have no intention of abandoning their residence in this State or of acquiring a domicile outside the State, but who leave the State merely for the purpose of temporarily engaging in work in another State. *Benson v. State*, 36 Ga. App. 87, 135 S. E. 514.

ARTICLE 43

Suffrage, Campaign Expenses, Campaign Funds, and Political Mass Meetings

§ 658. (§ 623.) Superintendent to deliver list to clerk, etc.

False Misstatement of Votes.—If the number of votes is knowingly and falsely misstated by a superintendent of an election, he has failed to discharge a duty imposed upon him by law, and he is liable to be prosecuted, under this section. *Black v. State*, 36 Ga. App. 286, 136 S. E. 334.

ARTICLE 51

Interest Illegally Taken

§ 700. Interest at greater rate than 5 per cent per month punished.

Section 3444 of the Civil Code and this section of the Penal Code were not repealed by section 3438(1). *Bennett v. Lowry*, 167 Ga. 347, 145 S. E. 505.

ELEVENTH DIVISION

Offenses Committed by Cheats and Swindlers

ARTICLE 1

Deceitful Means or Artful Practices

§ 702(ff). Park's Code.

See § 406(2).

§ 703(1). Defrauding hotels and boarding houses punishable.

Necessary for Fraudulent Intent. — The evidence in this case did not authorize the jury to find that the defendant, with intent to defraud, obtained food and lodging from the boarding-house named in the accusation. *Cowin v. State*, 35 Ga. App. 499, 133 S. E. 880.

Copy Must Be Printed and Posted.—One can not legally be convicted of violating this section unless the evidence shows that a copy of that law, "printed in distinct type," was "posted in the lobby, public waiting room, or that portion of the establishment most frequented by the guests thereof," at the time the accused obtained the food, lodging, or other accommodation. *Phillips v. State*, 39 Ga. App. 540, 148 S. E. 631.

713. (§ 668). False information as to liens.

Substitution for Section 719.—Where the judge based his instructions to the jury on this section, which was inapplicable to the case on trial, and made no reference to sec. 719, which was applicable, this was error, as the crime defined by the last-named section contains elements which it is necessary to allege and prove, different and distinct from those necessary to be alleged and proved under this section. *Sims v. State*, 34 Ga. App. 683, 685, 131 S. E. 101.

§ 715. Procuring money on contract for services fraudulently.

To authorize a conviction under the "labor-contract act" of 1903 (this section), the evidence must show a contract of service distinct and definite as to all essential terms, such as the time when the contract is to commence and terminate, and the amount of wages to be paid. *Bennett v. State*, 37 Ga. App. 20, 138 S. E. 671.

§ 716. Proof of intent to defraud.

Fraudulent Intent — Presumptive Evidence — Burden of Proof.—The burden of proving that one accused of a violation of this section did not have good cause for quitting the hirer rests upon the prosecution (*Thorn v. State*, 13 Ga. App. 10, 78 S. E. 853); and this essential proof is not furnished by the hirer's testimony that the accused "did not have any reason for not returning the money or picking the cotton." *Miller v. State*, 34 Ga. App. 140, 128 S. E. 588. See also *Cofer v. State*, 34 Ga. App. 220, 129 S. E. 110.

A conviction is unauthorized where the evidence fails to show that the laborer did not have a good and sufficient cause for his failure to perform the contract. Such essentials are not supplied by statements of the hirer that he knew of no good reasons why the laborer did not work for him. *King v. State*, 36 Ga. App. 272, 136 S. E. 466; *Cofer v. State*, 34 Ga. App. 220, 129 S. E. 110.

§ 718(a). Park's Code.

See § 703(1).

TWELFTH DIVISION

Fraudulent or Malicious Mischief

ARTICLE 3

Injuries to Bridges and Dams

§ 750. (§ 700). Breaking bridges, dams, banks, etc.

Although the offense charged was designated in the indictment as a "misdemeanor," the acts charged therein are a felony under this section, and on the trial the court did not err in treating the offense as a felony. *Pratt v. State*, 38 Ga. App. 114, 142 S. E. 903.

PROCEDURE

THE SUPERIOR COURT—ITS OFFICERS
AND JURIES

ARTICLE 1

Jurisdiction of the Court, and Authority of the
Judges

§ 792. (§ 792). Judges may grant writs of certiorari, supersedeas, hear motions, etc.

A judge of the superior court has jurisdiction to entertain, on habeas corpus, an application to lessen the amount of bail previously fixed by a judge of a city court on request of one accused of several violations of the State prohibitory liquor law. *Dickey v. Morris*, 166 Ga. 140, 142 S. E. 557.

§ 792(a). Park's Code.

See § 792(1).

§ 792(1). Certiorari on ground that venue or time not proved.

Cited in *George v. Rothstein*, 35 Ga. App. 126 132 S. E. 414.

ARTICLE 2

Sessions and Adjournments

§ 796. (§ 796.) Special terms for either civil or criminal business.

Applied in *Rawlings v. State*, 163 Ga. 406, 136 S. E. 448.

ARTICLE 4

Solicitors-General

§ 798. (§ 798). Special duties.

The act approved August 20, 1917 (Acts 1917, p. 283, § 3), is sufficiently broad to comprehend fees and costs that would be due a sheriff in criminal cases and to declare such fees and costs as due to the sheriffs to be the property of the county, and to confer on the clerk of the superior court the authority to collect and distribute such fees in lieu of the solicitors-general, whose duty it would be to collect and distribute the fees under the general law as embodied in this section of Penal Code. *Harris County v. Williams*, 167 Ga. 45, 144 S. E. 756.

Cited in *George v. Rothstein*, 45 Ga. App. 126, 132 S. E. 414.

This act, abolishing fee system in Chattahoochee Circuit, held invalid as to sheriff's costs and fees collected by solicitor-general and paid over under this section. *Harris County v. Williams*, 167 Ga. 45, 144 S. E. 756.

In so far as the act of 1917, supra, purports to make the costs and fees of the sheriff the property of the particular county, and to make it the duty of the clerk of the superior court to collect and distribute such fees, it is a special law relating to a matter covered by existing general laws, and to that extent the act is violative of Civil Code § 6391. *Harris County v. Williams*, 167 Ga. 45, 144 S. E. 756.

ARTICLE 5

Special Criminal Bailiffs

§ 808. (§ 808). Appointment and removal.—In each county having more than twenty thousand inhabitants, the solicitor-general of the superior, city, and county courts shall each be entitled to a special criminal bailiff, to be appointed by such solicitor-general with the approval of the judge of the court, and to be subject to removal by such judge and solicitor-general for misconduct in office, or other sufficient cause, to be judged by them; provided, however, that in all counties of this State having a population, according to the United States Census of the year 1920, or by any future census of the United States, of not less than seventy thousand and not more than ninety thousand inhabitants, the salary of the special criminal bailiff for the solicitor-general shall not be less than two hundred dollars per month, and the salary of the said special criminal bailiff for the solicitor of the city or county court shall not be less than one hundred seventy-five dollars per month, said salary to be paid monthly out of the county treasury; and provided also, that the solicitor-general of the superior court in such counties and the solicitor of the city court or county court therein be and they hereby are authorized, if they see fit, to appoint the same person to act as special criminal bailiff in both courts, the appointment, however, to be subject to approval of the judge of both courts. Acts 1929, p. 179, § 1; Acts 1929, p. 177, § 1.

ARTICLE 6

Stenographic Reporter

§ 810. (§ 810.) Reporters.

When Paid Out of Public Treasury.—The court could not assess as costs against the public treasury in a civil case between private parties the expense of requiring the notes of the official stenographer to be written out for the benefit of the judge. The case of *Bugg v. State*, 13 Ga. App. 672, 79 S. E. 748, is distinguished upon the ground that it was a criminal proceeding. *Macris v. Tsipourses*, 35 Ga. App. 672, 134 S. E. 621.

ARTICLE 7

The Grand Jury

§ 811. (§ 811). Qualification of grand jurors.

Illegal exercise of commissioners' power and discretion in revision of jury lists as to exclusion of Jews. *Bashlor v. Bacon*, 168 Ga. 370, 147 S. E. 762.

§ 819. (§ 818). Grand and traverse jurors, how selected.

It was good cause of challenge to the array, in the trial of a murder case, that the judge of the superior court, who drew the regular jurors embraced in such array, did so by taking from an alphabetical and numerical list of all jurors in the traverse-jury box every tenth juror on said list, commencing with number eight, and thus drawing until the necessary number to make up the panel was drawn, and by locating the corresponding numbers on the cards

in said jury box and removing them therefrom. *White v. State*, 166 Ga. 192, 142 S. E. 666.

§ 823. (§ 822). How drawn.

The language, "or otherwise disqualified by law," means a disqualification which renders it improper to put the name of a person in the grand-jury box and not a disqualification propter affectum. *Heaton v. State*, 38 Ga. App. 695, 145 S. E. 534.

In drawing grand jurors according to this section, the judge is not authorized, upon information based in part on what he knows and derived in part from others, to reject jurors so drawn upon the ground that they would be incompetent propter affectum to indict the person against whom a charge is preferred and is to be passed on by the grand jury. *Heaton v. State*, 167 Ga. 147, 144 S. E. 782.

§ 824. Ineligible at next succeeding term.

Section Modified by Acts of 1921.—The act of 1921 (p. 135), being a general law providing that the grand jurors of one term might be compelled to serve the following term, modified, so far as jurors serving in Walton superior court were concerned, the provisions of this section. *Long v. State*, 34 Ga. App. 125, 128 S. E. 784.

§ 827. (§ 824.) How summoned.

Section Directory.—The provision of this statute with respect to the precept is directory merely, and not mandatory, and a failure of the clerk of the superior court to carry out such provision affords no ground for a challenge to the array of the jurors put upon a defendant in a criminal case. *Newham v. State*, 35 Ga. App. 391, 133 S. E. 650, and cases cited.

§ 833. (§ 829.) Duty of grand jurors.

Cited in *Gibson v. State*, 162 Ga. 504, 134 S. E. 326.

§ 838. (§ 834). Oath of witnesses before grand jury.

Applied in *Aldridge v. State*, 39 Ga. App. 484, 147 S. E. 414.

§ 851(a). Park's Code.

See § 851(1).

§ 851(1). Transfer of investigation to grand jury of another county.

Necessity of Indictment Showing Change.—An indictment was not void for the reason that the jurisdiction of the grand jury of a county to which the investigation was transferred under this section to return the indictment did not appear from the indictment, it not being stated therein that the investigation of the crime had been transferred from Long County to Tattnall County. *Sallette v. State*, 162 Ga. 442, 134 S. E. 68. *Sallette v. State*, 35 Ga. App. 658, 134 S. E. 203.

While it might be better for the indictment to show that the trial judge had ordered the transfer, yet the omission of such facts from the indictment would not render the indictment void. See *Howell v. State*, 162 Ga. 14, 134 S. E. 59. *Sallette v. State*, 162 Ga. 442, 134 S. E. 68.

ARTICLE 9

The Petit Jury

§ 854. (§ 850.) Trial by jury.

Cited in *Paramore v. State*, 161 Ga. 166, 174, 129 S. E. 772.

§ 857. (§ 853). Panels, how made.

Number of Strikes in Consolidated Case.—Where several

cases pending against an estate are consolidated in one proceeding against a receiver therefor, the parties so joined have a right to only six strikes in selecting a jury. *Ellis v. Geer*, 36 Ga. App. 519, 520, 137 S. E. 290.

§ 858. (§ 854). Parties entitled to full panels.

To permit the members of the defendant corporation to try the case of their corporation would be in effect to permit the defendant to try its own case as a juror. To permit a juror to serve in his own case violates the fundamental principle that jury trials must be fair and free from suspicion of bias or prejudice, and is contrary to the principle announced in this section. *Bryan v. Moncrief Furnace Co.*, 168 Ga. 825, 828, 149 S. E. 193.

§ 859. (§ 855). Challenge for favor.

A party may avail himself of challenge to jurors on account of their interest in the case, by a motion to put the jurors on their voir dire. In such case the court may propound to each juror the questions indicated in this section, or he may propound them to the entire panel, adopting such plan as will assure a response to each question from each juror. *Bryan v. Moncrief Furnace Co.*, 168 Ga. 825, 828, 149 S. E. 193.

ARTICLE 10

Special Provisions as to Juries

§ 875. (§ 871.) Juries in special emergencies.

Applied in *Rawlings v. State*, 163 Ga. 406, 136 S. E. 448.

§ 876. (§ 872.) Compensation of jurors, and court-bailiffs; subpoena clerks.—The first grand jury impanelled at the fall term of the superior courts of the several counties shall fix the compensation of jurors and court bailiffs in the superior courts of such counties for the next succeeding year, such compensation not to exceed \$3.00 per diem; except in counties having a population of 200,000 or more, according to the last United States census, the compensation of court bailiffs as fixed by the grand jury shall be \$200.00 per month, provided the Commissioners of Roads and Revenues, or other authority having control of county finances of such counties shall first approve the payment of such salaries and the number of deputies to be employed in each court; and the same compensation shall be allowed to bailiffs and jurors of the several city courts and special courts in this State, as is allowed bailiffs and jurors in the superior courts in which such city or special court may be located. The pay of tales jurors shall be the same as the regular drawn traverse jurors, and there shall be no distinction in the pay of tales and regular drawn jurors.

The commissioners of roads and revenues or other authority having control of county finances of such counties may designate one of said bailiffs as a subpoena clerk in the Superior Court, may define his duty and fix his compensation at not exceeding two hundred dollars per month, to be paid monthly out of the county treasury. Acts 1890-1, p. 80; 1895, p. 74; 1919, p. 104; 1922, p. 50; 1925, p. 100; 1927, pp. 135, 193.

Editor's Note.—The compensation of court bailiffs in counties of 200,000 population or more was raised from \$150 to \$200; and the last sentence was added, by the amendment of 1927.

§ 876(h). Park's Code.

See § 876(1).

§ 876(1). Compensation in counties of 200,000 or more.—In all counties having by the United States census of 1920, or any future census, a population of 200,000 inhabitants or more, the salaries of court bailiffs appointed by the judges of the Superior courts and by the judges of the city courts shall be two hundred dollars per month for each bailiff, to be paid monthly out of the county treasury; provided, however, the commissioners of roads and revenues, or other county authority having charge of the fiscal affairs of said county, may, in their discretion, reduce said salaries to any sum not less than one hundred and fifty dollars per month for each bailiff. Acts 1927, p. 194.

ARTICLE 11

Childrens County Established as Branches of the Superior Court. Their Jurisdiction, etc.,—Juvenile Courts.

§ 900(o). Park's Code.

See § 900(41).

§ 900(41). Appointment, etc., of Judges in Certain Counties.—In all counties having a population of less than thirty-nine thousand eight hundred and fifty (39,850) and more than thirty-nine thousand eight hundred and forty (39,840), according to the Federal Census of 1920, the Judge of the Superior Court shall designate an existing court of record to act and be known as the juvenile court of said county, and fix a reasonable compensation for the judge thereof, not to exceed three hundred dollars per annum, in addition of any other compensation he may now receive, to be paid monthly out of the county treasury upon the order of such Judge of the Superior Court, as other court expenses are now paid. This shall involve no additional expense, except as is herein provided, shall create no new judge or court, but shall merely clothe any existing tribunal with additional powers. (a) Nevertheless, in all counties having a population between thirty-five thousand and sixty thousand, upon the concurrent recommendation of two successive grand juries, the judge of the superior court shall appoint a properly qualified person, of high moral character and clean life, selected for his special fitness for work with delinquent and neglected children, to be the judge of the juvenile court, whereupon it shall be considered that a special juvenile court has been established in said county. The term of the judge so appointed under this section shall be for three (3) years, and the salary shall be fixed by the appointing judge with the approval of the county commissioners. Provided, that where the establishment of the juvenile court has been recommended by a grand jury in any county of this State at the term of the superior court at which a grand jury was empaneled and sworn, next preceding August 14, 1915 (the date when the Supreme Court held the juvenile court law then supposed to be of force to be unconstitutional) a recommendation by the grand jury of the same county at the next term

of the superior court at which a grand jury is empaneled and sworn, after the passage of the amendments to the Acts of 1915 at the present session of the General Assembly, shall authorize the establishment of a juvenile court in all respects as though said court were recommended by two successive grand juries. Acts 1929, p. 279, § 3.

PROCEEDINGS TO COMMITMENTS, INCLUSIVE

ARTICLE 1

Proceedings Prior to Arrest

§ 904. (§ 883). What affidavit and warrant must state.

A substantial compliance with the provisions of this section and section 906 with reference to affidavits and warrants for the arrest of offenders against the penal laws, and the form of such warrants, is all that is required. *Kumpe v. Hall*, 167 Ga. 284, 145 S. E. 509.

ARTICLE 2

Arrest

§ 917. (§ 896.) Arrest without warrant.

Charging Exact Language.—A charge in entire harmony but not in exact language of this section and section 921 is neither a misstatement of law nor misleading. *Cobb v. Bailey*, 35 Ga. App. 302, 133 S. E. 42.

Applicable to State and Municipal Officers.—This provision of law "is applicable alike to State and municipal arresting officers." *Faulkner v. State*, 166 Ga. 645, 666, 144 S. E. 193.

§ 918. (§ 897.) Selection of judge to try the case.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 922. (§ 901.) Duty of person arresting.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 923. Arresting officer not to advise dismissal of warrant.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 927. (§ 904). Authority to eject passengers, etc.

Applied in Clinton v. State, 37 Ga. App. 79, 139 S. E. 82.

ARTICLE 3

Courts of Inquiry, and the Proceedings Therein

§ 947. (§ 922.) Bail.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 948. (§ 923.) Waiving trial.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 949. (§ 924.) Disposition of papers.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

INDICTMENT AND PRESENTMENT

ARTICLE 1

Form of Indictment

§ 954. (§ 929.) Form of indictment.

See notes to P. C. § 211(28).

When Guilt Follows as Legal Conclusion.—If, taking the facts alleged in the indictment as premises, the guilt of the accused follows as a legal conclusion, the indictment is good. Kidd v. State, 39 Ga. App. 30, 146 S. E. 35.

In proving the time of the commission of an offense the State is not, as a general rule, restricted to proof of the date alleged in the indictment, but is permitted to prove its commission on any date within the statute of limitations. Grayson v. State, 39 Ga. App. 673, 148 S. E. 309.

Sufficiency of Indictment for Car Breaking.—See Whitener v. State, 34 Ga. App. 697, 131 S. E. 301, and note to § 181.

ARTICLE 2

When Two Returns of "No Bill" Are a Bar

§ 955. (§ 930.) Two returns of "no bill" are a bar.

Change of Return after Entry on Minutes.—After a grand jury has returned into court a true bill of indictment, and the same has been entered on the minutes of the superior court by its clerk, the court obtains jurisdiction of the case, and the grand jury is without authority, at the same term of the court, to recall the true bill, erase the entry of "true bill," and make an entry of "no bill" on the indictment. Gibson v. State, 162 Ga. 504, 134 S. E. 326.

ARREST AND BAIL AFTER INDICTMENT
AND PROCESS AGAINST CORPORATIONS

ARTICLE 2

Bail, Surrender of Principal, and Forfeiture
of Bond

§ 959. (§ 934.) Bail but twice.

Applied in Knowles v. State, 166 Ga. 182, 142 S. E. 676.

§ 960. (§ 935.) Bail surrendering principal.

Accused surrendered by his principal to sheriff, after overruling of certiorari, has no right to discharge on habeas corpus. Franco v. Lowry, 164 Ga. 419, 138 S. E. 897.

CHANGE OF VENUE

ARTICLE 1

When and How Venue May Be Changed

§ 964. (§ 939.) Venue, when and how changed.

Venue changed under section in Howell v. State, 162 Ga. 14, 134 S. E. 59.

Cited in Sallette v. State, 162 Ga. 442, 134 S. E. 68.

§ 965. (§ 940.) Clerk to transmit papers, etc.; subpoenas for witnesses.

Cited in Howell v. State, 162 Ga. 14, 134 S. E. 59.

FROM THE CALL OF THE DOCKET TO
SENTENCE

ARTICLE 4

Pleas of Insanity, and Misnomer

§ 979. (§ 954.) Misnomer, plea of.

Applied in Rountree v. State, 34 Ga. App. 668, 670, 130 S. E. 919.

ARTICLE 10

Continuances

§ 987. (§ 962.) Continuance for absence of witnesses.

Applied in Teems v. State, 34 Ga. App. 594, 130 S. E. 216.

§ 990. (§ 964.) Continuance for absence or illness of counsel.

Applied in Evans v. State, 167 Ga. 261, 145 S. E. 512.

§ 992. (§ 966.) Discretion of the court.

Cross-Examination of Defendant on Motion.—It is not a reversible error to permit the defendant to be cross-examined on his motion for a continuance. Bell v. State, 36 Ga. App. 111, 112, 135 S. E. 521.

ARTICLE 11

Trial of Joint Offenders

§ 995. (§ 969.) Trial of joint offenders.

Number of Arguments. — Where two are tried together without objection they have a right to only one argument. Bloodworth v. State, 161 Ga. 332, 346, 131 S. E. 80.

ARTICLE 12

Impaneling the Jury

§ 997. (§ 971). Putting panel on prisoner.

Cited in *Rawlings v. State*, 163 Ga. 406, 136 S. E. 448.

§ 998. (§ 972). Challenge to the array.

Grounds for.—If there is objection to individual members of the panel of jurors, the challenge should be to the poll, and not to the array. *Thompson v. Buice*, 162 Ga. 556, 134 S. E. 303.

Form.—A challenge to the array, for any cause going to show that it was not fairly or improperly empaneled, must be in writing. *Thompson v. Buice*, 162 Ga. 556, 134 S. E. 303.

§ 999. (§ 973). Challenges for cause.

Relation in Ninth Degree Illustrated.—A juror who is related to the deceased in that his great great grandmother was a sister to the deceased's grandfather is sufficient to disqualify him. *Ethridge v. State*, 163 Ga. 186, 136 S. E. 72.

A person related by blood or marriage within the prohibited degree (the ninth degree) to stockholders of a bank is incompetent to serve as juror on the trial of an action brought by the bank. *Young v. Cochran Banking Co.*, 166 Ga. 877, 879, 144 S. E. 652.

§ 1001. (§ 975). Questions on voir dire.

Even though a juror had heard the evidence on a previous trial of the same case, this would not disqualify him unless he had formed and expressed an opinion from having heard the testimony delivered under oath. *Ford v. State*, 164 Ga. 638, 641, 139 S. E. 355.

The right to have jurors put upon their voir dire may be waived by a defendant; and where a jury is selected without any request being made by defendant or his counsel to have the jurors put upon their voir dire, this right is thereby waived. The fact that the prisoner and his counsel did not know that the jurors were not put upon their voir dire until after verdict is no sufficient reason for granting a new trial, unless it appears that they could not have discovered the existence of the fact by the exercise of ordinary diligence. *Smith v. State*, 168 Ga. 611, 615, 148 S. E. 531.

§ 1004. (§ 978). No investigation before triors.

The fact that the juror in this case "was examined touching his competency in the presence of his fellow jurors" was not such error as requires the grant of a new trial. *Evans v. State*, 37 Ga. App. 156, 139 S. E. 156.

Although a juror has been found competent and has been accepted, under the provisions of this section, the trial court is authorized, before any evidence has been submitted on the main issue, to put the juror on trial again as to his competency, if, subsequently to his acceptance, there has been brought to the attention of the court any evidence attacking his competency. *Evans v. State*, 37 Ga. App. 156, 139 S. E. 156.

ARTICLE 15

Evidence

§ 1008. (§ 982). Object of evidence.

Quoted in *Groves v. State*, 162 Ga. 161, 162, 132 S. E. 769.

§ 1009. (§ 983). Sunday definitions.

It was held no error to fail to define circumstantial evidence where the evidence was not wholly circumstantial in *Strickland v. State*, 167 Ga. 452, 145 S. E. 879. See also *Phillips v. State*, 39 Ga. App. 812, 148 S. E. 631.

§ 1010. (§ 984). Circumstantial evidence, when sufficient.

Necessity of Charging Language of Section.—The failure

of the court to charge the law of circumstantial evidence in the exact language of this section is not error. *Sellers v. State*, 36 Ga. App. 653, 137 S. E. 912.

A charge of court using "should" instead of "must", in quoting this section, does not require a new trial. *Adams v. State*, 34 Ga. App. 144, 128 S. E. 924.

Charge Held a Sufficient Compliance.—The language of the charge excepted to was not identical with the language of the section, but it substantially stated the provisions of that law. *Thompson v. State*, 166 Ga. 512, 143 S. E. 896.

That the court, in charging on circumstantial evidence, added to the language of this section after the words "reasonable hypothesis," the words "or theory," was not cause for a new trial. *Daniel v. State*, 39 Ga. App. 574, 148 S. E. 601.

Circumstances not authorizing conviction: Of cattle stealing. *Hire v. State*, 38 Ga. App. 116, 117. Of burglary. *Wallin v. State*, 38 Ga. App. 194. Of larceny. *Smith v. State*, 38 Ga. App. 741, 145 S. E. 500.

Conviction of murder supported by circumstantial evidence. *Shirley v. State*, 168 Ga. 344, 148 S. E. 91.

Applied in *Burgess v. State*, 164 Ga. 92, 137 S. E. 768; *North v. State*, 39 Ga. App. 119, 146 S. E. 347; *Heath v. State*, 38 Ga. App. 269, 143 S. E. 605.

Cited in *Hall v. State*, 36 Ga. App. 670, 137 S. E. 915; dissenting opinion in *Hill v. State*, 164 Ga. 500, 506, 139 S. E. 23.

§ 1012. (§ 986). Amount of mental conviction.

Cited in *Waller v. State*, 164 Ga. 128, 130, 138 S. E. 67.

§ 1013. (§ 987). When testimony warrants a conviction.

Charge of Court.—A charge substantially in the language of this section is not erroneous in that the court failed to charge the jury that the testimony should be sufficient to satisfy the minds and conscience of a fair and impartial jury, etc. *Smith v. State*, 34 Ga. App. 779, 131 S. E. 923.

Erroneous Charge under This Section.—The following charge under this section was held inaccurate: "Whether dependent upon positive or circumstantial evidence, the true question in all criminal cases is not that the conclusion to which the evidence points may be false, but whether or not the state has satisfied the minds and consciences of the jury beyond a reasonable doubt of the guilt of the accused." *King v. State*, 163 Ga. 313, 136 S. E. 154.

Cited in *Thompson v. State*, 166 Ga. 758, 759, 144 S. E. 301.

§ 1015. (§ 989). Presumption arising from failure to produce evidence.

A charge on the presumption arising from a failure to produce a witness is not applicable to a criminal case. *Waller v. State*, 164 Ga. 128, 138 S. E. 67.

§ 1017. (§ 991). Number of witnesses necessary.

Charging Part of Section When Inapplicable.—The court did not err in giving in charge this section as to the number of witnesses necessary to convict of perjury and certain other offenses, although a part of the section was not applicable to the case where the inapplicable part was explained. *Pence v. State*, 36 Ga. App. 270, 136 S. E. 820.

Perjury.—In this State there can be a legal verdict for perjury only when it is supported by the evidence of two witnesses or one witness and corroborating circumstances. Proof that the defendant had made contradictory statements is not alone sufficient. *Roddenberry v. State*, 37 Ga. 359, 360, 140 S. E. 386.

Uncorroborated testimony of an accomplice may be sufficient to convict of a misdemeanor. The rule that the testimony of an accomplice must be corroborated applies to felonies only. *Carson v. State*, 37 Ga. App. 100, 138 S. E. 920.

The testimony of the principal witness, an accomplice in the murder of which the accused was tried, was corroborated; and the conviction was authorized by the evidence. *George v. State*, 167 Ga. 532, 146 S. E. 120.

§ 1018. (§ 992). Alibi, as a defense.

Section given in charge. *Coggeshall v. State*, 161 Ga. 262, 131 S. E. 57.

Section held not applicable in *Strickland v. State*, 167 Ga. 452, 456, 145 S. E. 879.

ARTICLE 16

Rules Governing the Admission of Testimony

§ 1019. (§ 993). Character and conduct of parties.

Applied in *Cox v. State*, 165 Ga. 145, 139 S. E. 861.

ARTICLE 17

Of Hearsay

§ 1023. (§ 997). Sometimes original evidence.

Declarations of person afterwards slain, explanatory of his conduct, admissible on trial for murder. *Shirley v. State*, 168 Ga. 344, 148 S. E. 91.

Cited in *Sloan v. State*, 35 Ga. App. 347, 133 S. E. 269.

§ 1024. (§ 998.) Res gestae.

Cited in *Cain v. State*, 39 Ga. App. 128, 134, 146 S. E. 340.

§ 1025 (§ 999.) Declarations of conspirators.

Applied in *Ethridge v. State*, 163 Ga. 186, 191, 136 S. E. 72; *Lance v. State*, 166 Ga. 15, 19, 142 S. E. 105; *Farmers' & Traders' Bank v. Davis*, 39 Ga. App. 74, 146 S. E. 793.

§ 1026. (§ 1000). Dying declarations.

Preliminary proof sufficient to show that declarant was conscious of his condition. *Faulkner v. State*, 166 Ga. 645, 661, 144 S. E. 193.

A prima facie case is all that is necessary to carry dying declarations to the jury. *Faulkner v. State*, 166 Ga. 645, 661, 144 S. E. 193.

Where it was manifestly impossible that the deceased could have seen his assailant or known certainly who he was, a mere expression of opinion as to who he was is not admissible as a dying declaration; but where want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within his knowledge. In these circumstances it was a question for the jury whether the declaration represented the primary knowledge of the deceased or merely his opinion. *Strickland v. State*, 167 Ga. 452, 457, 145 S. E. 879.

§ 1027. (§ 1001). Testimony of witness on former trial.

Production of Articles Present at Former Trial.—Where the testimony, of a deceased witness who had testified at the former trial, contained references to certain physical objects, which at the former trial were in court, this fact did not stop the operation of this section on the ground that such articles were not produced in court at the trial now under review nor offered in evidence, even though the state did not account for their absence. *Bloodworth v. State*, 161 Ga. 332, 334, 131 S. E. 80.

Testimony of inaccessible witness, given at former trial, held admissible. *Sheppard v. State*, 167 Ga. 326, 336, 145 S. E. 654. See C. C. § 5773, ante.

ARTICLE 18

Of Admissions and Confessions

§ 1029. (§ 1003). Acquiescence or silence as admission.

Admissibility of Statements Made by Wife.—A former statement made in front of her husband and a third person

may not be proved by the third person unless the statement when made required an answer or denial. *Bowen v. State*, 36 Ga. App. 666, 137 S. E. 793.

§ 1031. (§ 1005). Weight of such evidence.

Omission to Charge as to Confessions.—In absence of a timely request, the court did not err in omitting to charge this section. Even where under the special facts of the case, it is the duty of the court without a request to charge upon the law of confessions, the omission to do so is not cause for a new trial, it appearing that without such confession there was sufficient evidence to warrant the conviction. *Gore v. State*, 162 Ga. 267, 134 S. E. 36.

§ 1032. (§ 1006). Confession must be voluntary.

See annotation to preceding section.

Testimony of confession of wrecking passenger-train, induced by hope of benefit or fear of injury, not admissible. *Lee v. State*, 168 Ga. 560, 148 S. E. 400.

Applied in *Mills v. State*, 38 Ga. App. 125, 143 S. E. 575.

§ 1035. (§ 1009). Confession of conspirators.

Application of Phrase "After the Enterprise Is Ended."—The phrase "after the enterprise is ended," necessarily makes admissible any statements made by any of the conspirators until the ultimate purpose of the conspiracy has been accomplished. Hence where a killing is only an incident in carrying out a purpose to accomplish some further object, it would seem to follow from the very wording of the section that where the enterprise had not ended, because the real purpose of the conspiracy has not been achieved prior to the completion of the enterprise, statements made even after such a killing and until the purposes of the conspiracy has been fully accomplished would be admissible on the trial of any of those engaged in the conspiracy. *Rawlings v. State*, 163 Ga. 406, 421, 136 S. E. 448.

ARTICLE 19

Prisoner's Statement

§ 1036. (§ 1010). Prisoner's statement.

Charge substantially in the language of the section upheld. *Coggeshall v. State*, 161 Ga. 259, 265, 131 S. E. 57.

An instruction on the statement of the accused, complying with this section, is not subject to an exception for omission, without appropriate request, to give in the same connection an elaborative instruction. *Bailey v. State*, 167 Ga. 318, 145 S. E. 456.

ARTICLE 20

Competency of Witnesses

§ 1037. (§ 1011). Persons not competent or compellable.

4. Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife is also competent witness to testify for or against her husband in case of abandonment of his child, as provided for in section 116 of this Code. Acts 1866, pp. 138, 139; 1880-1, p. 121; 1887, p. 30; 1927, p. 145.

Editor's Note.—Prior to the amendment of 1927 the ex-

ception contained in the fourth subdivision of this section concerned only the wife. Now both the husband and wife are competent for the purpose specified in the exception. Only that subdivision was affected by the amendment.

Proof of Statements Made by Wife. — Notwithstanding the statutory inhibition against the giving of testimony by a wife against her husband in a criminal case, yet where a wife makes statements in the presence of her husband and a third person which would implicate her husband in the violation of a criminal statute, and the husband makes no denial thereof, the third person may testify as to these statements. *Bowen v. State*, 36 Ga. App. 666, 137 S. E. 793.

§ 1038. (§ 1012). Persons who are incompetent witnesses.

Children.—The test as to the competency of a child of tender years to be a witness is knowledge by the child of the nature of an oath, and when an examination by the court shows that the child has no such knowledge it is error to permit the child to testify over proper objection. *Horton v. State*, 35 Ga. App. 493, 133 S. E. 647.

ARTICLE 21

Examination of Witnesses

§ 1045. (§ 1019). Leading questions.

When Discretion Not Abused.—The discretion of the trial judge was not abused, under the facts of the case in allowing the solicitor-general to ask certain leading questions of certain reluctant witnesses for the state. *Ethridge v. State*, 163 Ga. 186, 195, 136 S. E. 72.

§ 1046. (§ 1020). Memorandum in aid of witness's memory.

Cited in *Adams v. State*, 34 Ga. App. 144, 128 S. E. 924.

§ 1047. (§ 1021). Opinions of witness.

Applied in *Tanner v. State*, 163 Ga. 121, 122, 127, 135 S. E. 917.

ARTICLE 22

Impeachment of Witnesses

§ 1050. (§ 1024.) Impeaching one's own witness.

The evidence did not show that the solicitor-general was entrapped by a witness, within this section. *King v. State*, 166 Ga. 10, 142 S. E. 160.

§ 1052. (§ 1026). By contradictory statements.

Determination of Credibility within Province of the Jury.—This rule provides for impeachment of a witness and for sustaining him when his credibility has been attacked in the manner designated, but leaves it to the jury to determine whether the witness has testified truthfully. If the witness has been sustained by proof of general good character, that would go to his credit, but in the absence of such proof the truthfulness of his testimony would still be for determination by the jury. The mere fact that the witness had made statements out of court, contradictory to his testimony at the trial, would not as matter of law necessarily deprive his testimony of all probative value. *King v. State*, 163 Ga. 313, 322, 136 S. E. 154.

Necessity for Foundation.—In *Stewart v. Avery*, 38 Ga. App. 431, 433, 144 S. E. 218, it is said: "No foundation was laid for this testimony by proof of contradictory statements, as required by this section." This is necessary for the purpose of impeachment.

Charge.—It was held not error to fail to charge this section in the absence of a proper request in *Lee v. State*, 37 Ga. App. 632, 633, 141 S. E. 317.

ARTICLE 23

Argument of Counsel

§ 1055 (4). Extension of time.

Necessary Showing.—It is necessary that counsel make a showing in the manner prescribed, as to the necessity of an extension of time, in order to do justice to the case of their client. Where the showing required by the statute is not made it will not be held that there was any abuse of discretion on the part of the trial judge in refusing to extend the time for argument as requested. *Bloodworth v. State*, 161 Ga. 332, 346, 131 S. E. 80.

ARTICLE 24

Charge of the Court

§ 1058. (§ 1032.) Judge not to express opinion on the facts.

Statement as to Irrelevant Letter.—Statement that a letter offered, which was entirely irrelevant, had no probative value, was held not to be a violation of this section. *Tanner v. State*, 163 Ga. 121, 122, 129, 135 S. E. 917.

Reason for Ruling on Objection to Evidence No Expression of Opinion.—When an objection is made to evidence offered, the judge has a right, if he deems proper, to give the reasons for his decision on the objections; and such reasons so given if pertinent to the objections made, do not constitute an expression of opinion. *Reed v. State*, 163 Ga. 206, 213, 135 S. E. 748.

Stating an admitted fact does not constitute an expression or intimation of opinion. *Swain v. State*, 162 Ga. 777, 789, 135 S. E. 187.

Same—Assumption That Crime Committed.—There being nothing in the evidence or in the defendant's statement to dispute the fact that the alleged crime was committed, and his defense resting solely upon the contention that he did not participate in the offense, the court did not violate this section in assuming that a crime had been committed. *Pruitt v. State*, 36 Ga. App. 736, 138 S. E. 251.

Statement That There Was No Dispute.—No expression of opinion by statement that there was no dispute about a fact in evidence. *McCloud v. State*, 166 Ga. 436, 437, 444, 143 S. E. 558.

Applied in *Spivey v. State*, 38 Ga. App. 213, 214, 143 S. E. 450.

Section held not violated by charge in *Bailey v. State*, 167 Ga. 318, 320, 145 S. E. 456.

ARTICLE 25

The Verdict

§ 1059. (§ 1033). Jury judges of law and facts; form and construction of verdicts.

Interchanging "Maximum" and "Minimum."—It is reasonable to construe a verdict finding the accused guilty of making intoxicating liquor and fixing a "maximum" penalty of one year, and a "minimum" penalty of one and a half years as meaning a minimum of one year and a maximum of one and one-half years so as to uphold the validity of it under this section. *Jordan v. State*, 36 Ga. App. 648, 137 S. E. 798.

Where on joint trial of two persons for murder the jury returned a verdict finding one of them guilty of murder,

with recommendation to mercy, and finding the other guilty of "manslaughter" and fixing a maximum and a minimum sentence for him, it was error for the court to refuse to receive the verdict so far as it related to the latter finding, and to require the jury to reconsider the case as to the latter accused under instruction that he could not be convicted of voluntary manslaughter unless his codefendant also was guilty of that offense. *Allen v. State*, 164 Ga. 669, 139 S. E. 415.

§ 1060 (1). Jury to prescribe minimum and maximum term of punishment, when; rules of Prison Commission.

See notes to P. C. § 1068.

Emphasis of Power to Fix Minimum and Maximum Sentence.—The power given to the jury to prescribe a minimum and maximum term is emphasized by the further provision that "in cases of pleas of guilty, then the judge shall have the right to prescribe such minimum and maximum term as he may see fit." *Mitchell v. State*, 34 Ga. App. 505, 506, 130 S. E. 355.

Effect of Jury Failing to Fix Maximum and Minimum.—Where the jury failed to prescribe the maximum and minimum in a burglary case but merely recommended him to the mercy of the court, the verdict was not in proper form, and it was error for the judge to receive it and fix the minimum and maximum term of punishment. He should have sent the jury back to their room with the instruction that they fix the minimum and the maximum penalty. *Mitchell v. State*, 34 Ga. App. 505, 130 S. E. 355.

Right to Poll Jury.—Where the jury returned a maximum-minimum sentence and the judge immediately turned to the accused and stated that that would be his sentence, the accused was not deprived of his right to poll the jury. He had this privilege while the verdict was being reduced to writing and retired as a judgment. *Taylor v. State*, 36 Ga. App. 639, 642, 138 S. E. 83. Case distinguished from *McCullough v. State*, 10 Ga. App. 403, 73 S. E. 546.

§ 1060(2). Punishment to be fixed by city-court jury in county of 60,000 to 70,000 population.—Juries in their verdicts upon the trial of all cases upon the criminal side of the court, involving misdemeanors, in constitutional city courts having jurisdiction over counties whose population under the 1920 census of the United States was not less than sixty thousand inhabitants and not more than seventy thousand inhabitants, and over counties whose population under any future census of the United States shall be not less than sixty thousand inhabitants and not in excess of seventy thousand inhabitants, shall in their verdicts prescribe the sentence or punishment to be inflicted upon the defendant, in which verdict may be imposed an alternative sentence or a sentence imposing a fine, a term in jail, and a term upon the chain-gang, all within the limits prescribed by law for misdemeanors, either, any, or all of said punishments; and the judge in imposing the sentence upon the defendant shall follow that fixed by the jury in its verdicts.

In all such courts in cases wherein pleas of guilty shall be entered, then the judge shall have the right to prescribe the punishment within the limits fixed by law for misdemeanors. Acts 1927, p. 317.

This section violates the constitution §§ 6391, 6527, and 6382. *Cain v. State*, 166 Ga. 539, 540, 144 S. E. 6.

§ 1061. (§ 1035.) Jury may find the attempt.

Attempting to Manufacture Liquor.—The evidence was held not sufficient to support a verdict of attempting to manufacture liquor. *Hartline v. State*, 34 Ga. App. 224, 129 S. E. 123.

ARTICLE 26

The Sentence

§ 1062. (§ 1036.) Punishment; recommendation of the jury.

See notes to P. C. § 1068.

Recommendation of Misdemeanor Punishment for Mayhem.—The failure of the court to instruct the jury that in case they should convict the defendant of mayhem, they would have the right to recommend that he be punished as for a misdemeanor was not error. *Cowart v. State*, 34 Ga. App. 517, 130 S. E. 358.

Minimum and Maximum Penalty.—When the jury rendered a verdict of guilty, with a recommendation that the defendant be punished as for a misdemeanor, it was not error for the court to direct the jury to fix a minimum and maximum penalty. *Mitchell v. State*, 34 Ga. App. 505, 650, 130 S. E. 355; *Lee v. State*, 35 Ga. App. 235, 133 S. E. 281; *Young v. State*, 36 Ga. App. 308, 136 S. E. 459; *Jordan v. State*, 36 Ga. App. 648, 650, 137 S. E. 863, and cit.; *McKenzie v. State*, 38 Ga. App. 200, 143 S. E. 442.

Effect of Recommendation.—Where a defendant is convicted of a felony and where, under this section, the jury recommends that he be punished as for a misdemeanor, the recommendation is advisory only, and the failure of the judge to follow the recommendation is not cause for a new trial. *McKenize v. State*, 38 Ga. App. 200, 143 S. E. 442.

§ 1065. (§ 1039.) Misdemeanors, how punished.

Judge's Discretion in Sentencing.—Where a female, under indictment for a misdemeanor, pleads guilty, the judge may in his discretion sentence her to labor and confinement in the woman's prison on the state farm. *Conley v. Pope*, 161 Ga. 462, 131 S. E. 168.

Dividing Sentence into Two Periods.—The fact that the judge divided the sentence into two periods of six months each, did not make the total sentence to the chain-gang exceed the period fixed by the statute. *Scott v. McClelland*, 162 Ga. 443, 445, 133 S. E. 923.

Sentence to Hard Labor.—A sentence in a misdemeanor case which provides that the person convicted shall be confined at hard labor for the space of one year at the state farm is not in conformity with this section as it provides that the convict shall "work" or "labor," and this does not necessarily mean "hard labor." *Screen v. State*, 107 Ga. 715, 33 S. E. 393; *Potter v. State*, 35 Ga. App. 248, 132 S. E. 783.

Power to Give Less than Maximum.—The court, having the power to both pass upon the defendant a sentence of twelve months and to impose a fine of not exceeding \$1,000, could do less than both, and could do so without giving the defendant any election as to paying or refusing to pay the fine. *Dickson v. Officers of Court*, 36 Ga. App. 341, 343, 136 S. E. 537.

Cited in *King v. State*, 37 Ga. App. 334, 140 S. E. 513; *Swanson v. State*, 38 Ga. App. 386, 144 S. E. 49.

§ 1066. (§ 1040.) Attempts, how punished.

Cited in *Hartline v. State*, 34 Ga. App. 224, 129 S. E. 123.

§ 1067. (§ 1041.) Several imprisonments to be successive.

Cited in *Teasley v. Nelson*, 164 Ga. 242, 246, 138 S. E. 72.

§ 1068. (§ 1042.) Conviction of second offense, longest time.

See notes to P. C. § 183(1).

This section does not violate the double jeopardy clause of the constitution. *Tribble v. State*, 168 Ga. 699, 148 S. E. 593.

This section of the Penal Code does not violate paragraph 5 of section 1 of article 1 of the constitution of this State, which guarantees to one accused of crime an impartial trial. *Tribble v. State*, 168 Ga. 699, 148 S. E. 593.

This section was not repealed by § 1062 nor by § 1060(1). *Tribble v. State*, 168 Ga. 699, 148 S. E. 593.

§ 1069(a). Park's Code.

See § 1069(1).

§ 1069(1). Electrocution substituted for hanging.

Constitutionality.—There is no merit in the alleged grounds of attack upon the constitutionality of this and the following section. There being no provision in the constitution conferring upon sheriffs of counties the power to execute sentences of the courts in capital cases, the manner of execution of such sentences is for legislative enactment, as is the matter of defining the crime of murder and providing for its punishment. *Dunaway v. Gore*, 164 Ga. 219, 138 S. E. 213. Nor did the act contain matter not expressed in its caption. *Howell v. State*, 164 Ga. 204, 138 S. E. 206.

The language, "within the walls of the State Penitentiary at Milledgeville, Georgia," in this section means the State Prison Farm located near Milledgeville; and the language, "There shall be present at such execution the warden of the penitentiary," in section 1069(4), means any warden of said prison, and embraces the superintendent of said prison, who is the warden of the male camp of said penitentiary. Those two sections of said act are not so vague and indefinite as to render them null and void. *Howell v. State*, 164 Ga. 204, 138 S. E. 206.

Construing the terms of §§ 1069(1) and 1069(4) as referring to the State Prison Farm located near Milledgeville, and as conferring the authority expressed in section 1069(4) on any warden of said prison, including the superintendent thereof who is the warden of the male camp of the penitentiary, the execution by that superintendent, of the sentence for murder, would not deprive the condemned person of due process of law. *Dunaway v. Gore*, 164 Ga. 219, 138 S. E. 213.

Applied in *Gore v. Humphries*, 163 Ga. 106, 135 S. E. 481.

§ 1069(d). Park's Code.

See § 1069(4).

§ 1069(4). Execution by warden and assistants; witnesses.

See notes to § 1069(1).

Applied in *Gore v. Humphries*, 163 Ga. 106, 135 S. E. 481.

§ 1070. (§ 1044). Sentence shall specify time and place.

Fixing New Date for Unexecuted Sentence.—When the day fixed by the trial court for the execution of a capital sentence has passed, and the sentence for any reason whatever has not been executed, it is the duty of the judge of the superior court in which the sentence of death was imposed, either in term or in vacation by an order as prescribed by law to name and fix a new date for the execution of said capital sentence, which shall be not less than ten days nor more than twenty days from the date of said order. *Gore v. Humphries*, 163 Ga. 106, 135 S. E. 481.

§ 1081(a). Park's Code.

See § 1081(1).

§ 1081(1). Probation of offenders.

Constitutionality.—This act is not unconstitutional. *Williams v. State*, 162 Ga. 327, 133 S. E. 843; *Rhodes v. State*, 162 Ga. 627, 134 S. E. 448.

"The words, 'on such conditions as it may see fit,' are very broad, and the court will not say that the portion of the sentence of which complaint is made is not authorized by the terms of the act." *Swanson v. State*, 38 Ga. App. 386, 387, 144 S. E. 49.

Oral Remarks to Sheriff as Constituting Probation.—The oral remarks of the judge to the sheriff, in passing sentence on the defendant, to watch after her, and if he had further trouble with her to take her to the chain-gang, can not be construed as placing the defendant upon probation, under this act as such oral declarations of the judge constitute no part of the sentence. *Conley v. Pope*, 161 Ga. 462, 131 S. E. 168.

Power to Suspend Sentence.—Under this section the judge has no power to pass a sentence and then suspend it, and where he has attempted to do so this section has no application. *Kemp v. Meads*, 162 Ga. 55, 132 S. E. 533.

The general rule is that a judge of the superior court of this State has no authority to suspend execution of a

sentence imposed by him in a criminal case. Where he does suspend such sentence, so much of the sentence as orders a suspension may afterwards be revoked and the prisoner be required to serve the sentence. *Scott v. McClelland*, 162 Ga. 443, 133 S. E. 923.

§ 1081(d). Park's Code.

See § 1081(4).

§ 1081(4). Delinquent probationers.

Limitation upon Power to Withdraw Parol.—A parole can not lawfully be revoked as a mere matter of caprice. In such hearing the judge is the sole judge of the credibility of the witnesses, but he is not permitted to withdraw a parole unless there be sufficient evidence to authorize a finding that one or more of the conditions upon which the parole was granted has been violated. *Williams v. State*, 162 Ga. 327, 133 S. E. 843.

Where it can not be determined whether the criminal act charged against the probationer as in violation of his parole was committed prior to the imposition of the sentence or subsequent thereto, a finding revoking the parole would be contrary to law and would not be authorized. *Williams v. State*, 162 Ga. 327, 133 S. E. 843.

Review on Bill of Exceptions.—*Watts v. State*, 36 Ga. App. 215, 136 S. E. 323, followed the cases cited under this catchline in Ga. Code 1926. See also *Kennedy v. State*, 36 Ga. App. 602; 137 S. E. 573; *Anderson v. State*, 36 Ga. App. 602, 137 S. E. 572.

Cited in *Taylor v. State*, 36 Ga. App. 639, 642, 138 S. E. 83.

§§ 1081(e), 1081(f). Park's Code.

See §§ 1060(1), 1060(2).

NEW TRIALS, AND THE SUPREME COURT

ARTICLE 1

When New Trial Will, and Will Not Be Granted

§ 1088. (§ 1061.) On account of new evidence.

See annotation under section 5480 of the Civil Code.

ARTICLE 2

The Motion and Proceedings Thereon

§ 1090(a). Park's Code.

See § 1090(1).

§ 1090(1). Objections before trial judge.

Cited in *George v. Rothstein*, 35 Ga. App. 126, 132 S. E. 414; *Taunton v. Taylor*, 37 Ga. App. 695, 141 S. E. 511.

§ 1091. (§ 1064.) Motion made after adjournment of court.

Notice Relates to the Time for Absolute Rule.—The notice required by this section "relates to the time when the party (having at term regularly moved his rule nisi) shall apply for his rule absolute," and is complied with when the opposite party is served with the copy of the motion for new trial and the rule nisi issuing thereon twenty days before the time at which the hearing is to be had under the rule nisi. *Coggeshall v. Park*, 162 Ga. 78, 80, 132 S. E. 632.

ARTICLE 3

The Supreme Court

§ 1096. (§ 1068.) When a writ of error lies.

A ruling on a demurrer can not properly be made a ground of a motion for a new trial. *Quattlebaum v. State*, 32 Ga. App. 68, 122 S. E. 637; *Cunningham v. State*, 38 Ga. App. 236, 143 S. E. 602.

§ 1101(a). Park's Code.

See § 1101(1).

§ 1101(1). Proof of venue or time of commission of offense.

Applied in *Brown v. State*, 38 Ga. App. 196, 198, 143 S. E. 457.

Cited in *George v. Rothstein*, 35 Ga. App. 126, 132 S. E. 414.

COSTS, FINES, AND FINE AND FORFEITURE FUND

ARTICLE 3

Fine and Forfeiture Fund

§ 1114. (§ 1087.) Insolvent costs, how paid.

Under this section "the officers bringing it into court" are those who are in office when the money is actually paid into court. *Lane v. Duke*, 37 Ga. App. 146, 139 S. E. 122.

SALARIES AND FEES OF OFFICERS, WITNESSES, AND JURORS

ARTICLE 8

Jury Commissioners and Clerks

§ 1138(b). Park's Code.

See § 1138(3).

§ 1138(3). Jury Commissioners in Counties of two hundred thousand or more.—Jury commissioners and their clerks in all counties in the State having a population, according to the United States Census of 1920 or any future census, of two hundred thousand or more shall be paid ten dollars (\$10.00) each for every day's service in revising the jury list, said compensation to be paid from the county treasurer; provided, however, that any commissioner or clerk who is already on the county payroll shall receive no additional compensation for services under this Act. Acts 1927, p. 222.

§ 1138(d). Park's Code.

See § 1138(4).

§ 1138(4). Jury commissioners and clerks in counties with population between 33,000 and 33,050.—Jury commissioners and their clerks in all counties of this State having a population, according to the United States census of 1920, of not less than 33,000 and not more than 33,050, shall be paid five (\$5.00) dollars each for every day's service in revising the jury-list. Said compensation to be paid from the county treasury. Acts 1927, p. 147.

§ 1138(5). Jury commissioners in certain other counties.—Jury commissioners and their clerks, in all counties having a population, according to the United States Census of 1920, of not less than 26,108 and not more than 26,110, shall be paid five dollars (\$5.00) each for every day's service in revising the jury-list. Said compensation to be paid from the county treasury. Acts 1929, p. 182, § 1.

§ 1138(6). In counties of 18,355 to 18,365 population.—Jury commissioners and their clerks, in all counties of this State having a population according to the United States Census of 1920 of not less than 18,355 and not more than 18,365, shall be paid five dollars (\$5.00) each for every day's service in revising the jury-list; said compensation to be paid from the county treasury.

All laws and parts of laws in conflict with the provisions of this section, and especially the conflicting portions of section 1138 of the Penal Code of Georgia, be and the same are hereby repealed. Acts 1929, p. 277, § 1.

ARTICLE 13

Witnesses from Other Counties, and When Venue Is Changed

§ 1143. (§ 1114.) Subpoena for non-resident State's witness.

Void if Not Signed by Clerk and Solicitor General.—Unless at the time a subpoena for a non-resident witness for the state in a criminal case is issued it is signed both by the clerk of the superior court and the solicitor-general of the circuit, it is void. *Cody v. Boykin*, 163 Ga. 1, 135 S. E. 75.

COUNTY JAILS

ARTICLE 1

Duties of Jailer

§ 1152. (§ 1123.) United States prisoners.

See notes to P. C., § 319.

Section 1152 was codified from the act of the General Assembly approved November 12, 1889 (Ga. L. 1889, p. 47), and the last clause thereof refers solely to the duties and responsibilities of the keeper of a county jail in safely keeping and humanely treating such United States prisoners as may be received by him. *Brandon v. State*, 37 Ga. App. 495, 141 S. E. 63.

MISDEMEANOR CONVICTS

ARTICLE 1

How Disposed of

§ 1167. (§ 1138.) Safe-keeping, support, and employment.

Quoted in *McConnell v. Floyd County*, 164 Ga. 177, 137 S. E. 919.

ARTICLE 3

Time Shortened for Good Behavior

§ 1179. (§ 1150.) Good behavior of misdemeanor convicts.

Applied in *McConnell v. Floyd County*, 164 Ga. 177, 137 S. E. 919.

THE PENITENTIARY

ARTICLE 1

Prison Commission, Control of Convicts, Duties of Officers, Etc.

§ 1203. Purchase of farm and control thereof.

Cited in reference to designation of penitentiary in electrocution act of 1924. *Howell v. State*, 164 Ga. 204, 211, 133 S. E. 206.

§ 1214. State farm and central penitentiary.

Cited in reference to designation of penitentiary in electrocution act of 1924. *Howell v. State*, 164 Ga. 204, 211, 133 S. E. 206.

ARTICLE 3

Miscellaneous Provisions

§ 1230. (§ 1174.) Expenses of trials for escapes.

Fund Out of Which to Be Paid.—No reference is made here or elsewhere in the code as to the fund from which the expense is to be paid, and it seems that the provision in the act of 1823, that it shall be paid out of the penitentiary fund, remains unrepealed. *Campbell v. Davison*, 162 Ga. 221, 133 S. E. 468.

TAX TO SUPPORT PRISONERS IN CERTAIN COUNTIES

§ 1236(1). County tax to support prisoners. — In those counties in the State of Georgia having

a population, according to the United States census of 1920, or any future census, of not less than 44,195 nor more than 63,690 the commissioners of roads and revenues are hereby authorized, in their discretion, to levy a tax annually upon the taxable property in said counties, the proceeds of which are to be used by said commissioners for the maintenance and support of prisoners, including the chain-gang operated by said counties. Acts 1927, p. 339.

§ 1236(2). Use of chain-gang on municipal streets.—Said commissioners may in their discretion, for the purpose of keeping said chain-gang regularly engaged, employ said chain-gang upon the streets or public works of municipalities located in said counties, as well as upon the rural roads and public works of said counties, so long as the expense of maintaining and supporting said chain-gang does not exceed the amount raised by said tax levy.

§ 1236(3). Separation of tax fund.—In those counties coming within the terms of this Act, in which the provisions of the alternative road law, contained in the Code of Georgia of 1910, sections 694 to 704, inclusive, are in effect, the funds derived from tax levies made for the maintenance and support of prisoners and the funds derived under the provisions of the alternative road law shall be kept separate and apart, in order that no portion of the tax funds derived under the alternative road law shall be applied to the expense of maintaining and supporting the chain-gang while engaged in work other than upon the rural roads.

GEORGIA TRAINING SCHOOL FOR GIRLS

ARTICLE 1

Establishment and Management

§§ 1259(d)-1259(f). Park's Code.

See § 1259(5).

§ 1259(5). No compensation; Oath and bond; expenses.—Said Board of Managers shall receive no compensation for their services, and they shall qualify on said board, taking and subscribing to an oath faithfully and impartially to discharge their duties, and entering into bond in such sums and in such securities as shall be prescribed by the Governor, conditioned on the faithful performance of all duties required of them in this Act. The actual and necessary expenses of this Board of Managers incurred in the discharge of their official duties, together with the expense of making said bonds herein provided, shall be paid out of the general appropriation for said institution. Said Board of Managers shall organize by electing one of their members as chairman and another as secretary of said board; and when it may be deemed advisable, said board shall appoint a competent woman

as superintendent of said institution, at a salary to be fixed by said Board of Managers, and shall appoint such other employees as may be necessary to carry on the work of said institution, prescribing the duties of both the superintendent and all other employees; provided, the salary of said superintendent and said employees as well as the expenses of the Board of Managers shall be paid out of the maintenance fund, appropriated by § 1259(3). The superintendent and all other employees shall be subject to removal from office at any time by said board. It shall be the duty of said Board of Managers to meet once every three months, for the purpose of attending to such matters as may come before them in the management of said institution. Special meetings may be called by the chairman. Absence from any three meetings, unless excused by the majority of the members present, shall be treated by the Governor as a resignation from office. Acts 1913, pp. 87, 89; 1919, p. 285; 1927, p. 341.

Editor's Note.—The amendment of 1927 combined this section with § 1259(6), and, in addition to other immaterial omissions, omitted the word "other" preceding the word "members" in the last sentence of the combined section.

§ 1259(6). Included in the amendment to § 1259(5) by the Acts of 1927.

§ 1259(i). Park's Code.

See § 1259(9).

§ 1259(9). Who may be committed and how; fees for carrying persons to school.—The Judges of the City and Superior Courts may in their discretion commit to the Georgia Training School for Girls any girl under eighteen years of age who has committed any offense against the laws of this State, not punishable by death or life imprisonment, or who habitually associates with vicious or immoral people, or who is incorrigible to such an extent that she cannot be controlled by parent or guardian, there to be held until such girl reaches the age of twenty-one, unless sooner discharged, bound out, or paroled under the rules and regulations of said Board of Managers; provided, however, that no girl who is insane or an idiot or who comes under the classification of mental defectives as defined in section 3 of Act approved August 19, 1919, establishing the Georgia Training School for Mental Defectives, or who is afflicted with an incurable disease, shall be sentenced or committed to said institution. The Judges of the City and Superior Courts may hear and determine such cases, presiding in a court or in chambers; provided, that any girl brought before a court shall have a right to demand trial by jury, and may appeal from the judgment of said court as provided by law. The fees that are now allowed by law for carrying persons to the penitentiary shall be allowed to the sheriffs of the various counties of the State, for services in taking such girls as may be committed by the several courts to the Georgia Training School for Girls. Acts 1913, pp. 87, 90; 1927, p. 343.

Editor's Note.—The exception, in the proviso, as to girls who came under the classification of mental defective as defined by the Act of 1919, is new with the amendment of 1927.

§ 1259(j). Park's Code.

See § 1259(10).

§ 1259(10). Improper subjects returned; how dealt with; parole.—The superintendent in charge of such institution be and, with consent of the chairman of Board of Managers, shall be authorized and empowered to return whence she came any girl who shall be found an improper subject for admission, and who shall thereupon be dealt with by the court or judge committing her as would have been legal in the first instance had not said girl been committed to the said Georgia Training School for Girls; and provided, that said Board of Managers shall be authorized to discharge or release any inmate from said institution, or to liberate conditionally on parole any inmate of said institution, under such rules and regulations and upon such terms as said Board of Managers may deem in the best interests of the inmate. Acts 1913, pp. 87, 90; 1927, p. 349.

Editor's Note.—By the amendment of 1927 the Board of Managers are authorized to discharge or release any inmate. The amendment omitted a provision which authorized the Board of Managers to bind out to some suitable person any inmate, or return her to her parents or guardian.

SPECIAL QUASI CRIMINAL PROCEEDINGS

Habeas Corpus

ARTICLE 1

Proceedings in Applications for Habeas Corpus

§ 1307. (§ 1226.) How wife or child may be disposed of.

See annotation to § 2972 of the Civil Code.

§ 1313. (§ 1232.) Proceedings must be recorded.

Filing Papers after Hearing by the Judge.—Manifestly this section contemplates filing the papers in the proceedings with the clerk of the superior court after the hearing by the Judge. *Collard v. McCormick*, 162 Ga. 116, 119, 132 S. E. 757.

§ 1314. (§ 1233.) Notice of the hearing.

Waiver by failure to object, before hearing, to lack of notice prescribed. *Pridgen v. James*, 168 Ga. 770, 149 S. E. 48.

PENSIONS AND CONFEDERATE SOLDIERS' HOME

ARTICLE 1A

Pensions of Ex-Confederate Soldiers and Widows

§ 1482(15). Pensions of Confederate soldiers and widows, \$360 per annum, payable \$30 a

month; additional clerk of Pension Commissioner.—On and after January 1st, 1930, the annual pensions paid to the Confederate soldiers and their widows shall be \$360.00 per annum to the Confederate soldiers and \$360.00 per annum to their widows, and these amounts are to be paid monthly on the first day of each month; provided, however, that the Confederate soldiers shall not receive the amount named in this Act and the amount that they are now receiving from the State, but are to receive only \$360.00 per annum and to be paid this amount in installments of \$30.00 per month as provided in this Act; and provided further, that if there are widows of Confederate soldiers who are now drawing a pension under any prior law, that they shall come under this Act; and to provide further, that if there are any widows of Confederate soldiers who are now drawing a pension under any prior law, that they shall not receive any other pension except that provided for, in this Act, but may be increased up to the amount herein named; provided further, that if any portion of this Act is held invalid, then and in that event the portions not so held shall remain in force; and provided further that the amount to be paid the widows shall be paid in installments of \$30.00 per month on the first day of each month as herein provided for. Provided further that in order to carry out the provisions of this Act the Pension Commissioner is hereby authorized to employ an additional clerk at a salary not exceeding fifteen hundred (\$1,500.00) dollars per annum, the same to be paid out of appropriations made to pay pensions. Acts 1929, p. 221, § 1.

PENSIONS FOR COUNTY EMPLOYEES

§ 1519(44). County employees in counties of more than 200,000 people.—There may be raised and established funds for the aid, relief, and pensions of the employees of the county and their dependents, in all counties having a population of more than two hundred thousand by the United States census of 1920, or any subsequent census of the United States. Acts 1927, p. 262.

§ 1519(45). Right to retire after 25 years service.—Every employee and future employees who may participate in the pension fund may as a matter of right retire from active service, provided he shall have been an employee of the county for twenty-five years at the time of his retirement.

§ 1519(46). Voluntary retirement of disabled employees.—Any employee who is eligible to participate and future employees who are eligible to participate, who shall be injured or whose health shall become permanently impaired to render them totally disabled, shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third, and their decision shall decide the question.

§ 1519(47). Half-pay after retirement; pension for widow, etc.—When such employee shall retire as a matter of right he shall be paid one-half of his salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner, his widow and children or dependents shall draw his pension as herein provided.

§ 1519(48). Half-pay for total disability.—When such employees shall be retired for total disability, he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly; but this Act shall not affect any aid or relief or pension received at the time of the passage of this Act.

§ 1519(49). Board of trustees for fund; members.—There is hereby established a board of trustees whose duties it shall be to manage said fund. The board of trustees shall consist of the chairman of the commissioners of roads and revenues, the chief of the county police department, and the superintendent of public works of the county; and if there be no chairman of the commissioners of roads and revenues, and if there be no chief of county police, and if there be no superintendent of public works, the county authorities having charge of the affairs of the county shall manage said pension funds. The trustees shall formulate rules for taking care of employees, and prescribe regulations and conditions under which said aid, relief, and pensions shall be paid. The board shall keep a strict account of disbursements and receipts of all funds, which shall be open at all times to public inspection. The board of trustees shall have its first meeting on Friday following the first Monday in October after the passage of this Act, and organize by electing a chairman, a vice-chairman, and a secretary. The chairman shall sign all vouchers.

§ 1519(50). Deduction from salaries.—All county employees who desire to participate in the pension fund shall have two (2) per cent. of their salaries deducted monthly.

§ 1519(51). Return of amount deducted from salary.—In case an employee who has not served twenty-five years and whose employment has been severed by the county, he shall receive the amount deducted from his salary for the pension fund.

§ 1519(52). Involuntary retirement.—In case an employee has served twenty-five years does not desire to retire, the board of trustees may in their discretion retire him, after first obtaining the consent of the county commissioners.

§ 1519(53). Former pensions not affected.—This Act shall not repeal nor in any wise affect any pensions or benefits or aids now being paid to those who were receiving the same and who shall receive the same after the passage of this Act.

§ 1519(54). Widow and children, pension of,

stops when.—When any employee has served twenty-five years, and who has not taken a pension, dies, his widow and minor children shall receive his pension until such widow shall remarry, or until such minor children or dependents shall have reached the age of sixteen years.

§ 1519(55). Workmen's compensation law not affected.—This Act shall not affect or be affected by any workmen's compensation law or other similar laws.

§ 1519(55½). Pensions for widows of employees of cities of more than 150,000 population.—The pensions set up and provided for in twelve preceding sections shall, in case of the death of the pensioner, if he leaves a widow be continued to such widow during the remainder of her life, except such widow's pension shall cease in case of her remarriage, in case the officer or employee could have secured a pension on account of services but failed, to do so and continued in the service and employment of the city, and dies without having a pension set apart for him, his widow may apply for such pension and have same set apart to her during her life of widowhood. Acts 1929, p. 313, § 1.

§ 1519(55a). Pensions of employees of counties of 52,995 to 80,000 population.—There may be raised and established funds for the aid, relief, and pensions of employees of the county in all counties in this State having therein a city with a population of not less than fifty-two thousand, nine hundred ninety-five and not more than eighty thousand, according to the United States census of 1920. 1929, p. 309, § 1.

§ 1519(55b). Half pay for employees serving 25 years continuously.—Whenever any employee of any county to which this Act applies shall have served for twenty-five years continuously and without interruption in the employment of such county, he shall be permitted to retire from active service upon his own application, on pay equal to one-half the salary received on the date of retirement; subject, however, to the following terms or conditions:

(a) Any such employee desiring to retire shall obtain from the county physician of such county, if there be one, otherwise from some reputable physician practicing in the said county, a certificate to the effect that such employee is no longer fit and competent to perform the active duties of his position, together with a statement of the grounds of unfitness or incompetency. Upon presentation of such certificate to the county board of commissioners or other fiscal agent of said county, such application shall be passed upon, and, if the application is found to be meritorious, shall be approved and adopted, and the employee shall then be retired on one-half pay, as herein stated, which shall be paid to him under the same rules and regulations as other employees of the county are paid. The action of such board of county commissioners upon any such application shall be final and conclusive upon the applicant; provided said county commissioners or other fiscal agent may at any time

upon sufficient cause, to be judged by such board or other fiscal agent, reconsider said application, and, if it appears that same was improvidently granted, rescind such action and order the employee back to work, and, upon his failure or refusal within ten days to resume his duties, his pension shall automatically cease and determine; and provided further that if the condition of the employee is changed so that in the opinion of said board or other fiscal agent he is able to resume his duties and can do so consistent with the best interests of the county, he shall be ordered to resume his duties, and, upon his failure or refusal so to do within ten days, his pension shall automatically cease.

(b) Such employee, as long as he is upon the pension list, shall be relieved of all active duty of his position and be free to engage in such other occupation or business as he may desire.

(c) The pension granted under the provisions of this Act shall continue to be paid to the employee so pensioned for and during the term of his natural life, unless sooner terminated under the provisions hereinbefore contained, or the repeal or modification of the law under which the pension is granted.

(d) The pension or sums payable thereunder shall not be subject in whole or in part to assignment, sale, pledge, or other disposition, and shall be payable only to the employee so pensioned.

(e) Said county board of commissioners or other fiscal agent shall have the right, upon taking appropriate action therefor, to retire on half pay any employee of such county who may have served continuously and without interruption for a period of twenty-five years next preceding such retirement, whether or not such employee himself desires to be retired. The action of such board or other fiscal agent shall in every way be final and conclusive upon such employee. Acts 1929, p. 309, § 2.

§ 1519(55c). Act applicable to teachers and other employees of board of education.—In any county to which this Act is applicable, where there is a board of education controlling the schools of the entire county, that the terms and provisions of this Act shall apply to the teachers or other employees of such board of education; provided that as to such teachers such board of education will determine, under rules applicable to county employees, what teachers shall be placed upon the pension list and entitled to half pay, as hereinbefore provided. Acts 1929, p. 311, § 3.

§ 1519(55d). Two per cent of salaries deducted monthly.—All county employees or teachers who desire to participate in the pension fund shall have 2 per cent of their salaries deducted monthly. Acts 1929, p. 311, § 4.

§ 1519(55e). Funds from deductions from salaries.—The funds arising from the deductions from salaries as aforesaid shall be held under direction of the county board of commissioners, so far as county employees are concerned, and under the direction of any such board of education, so far as teachers are concerned, provided that

a complete and accurate record of such fund, any investment thereof, and any disbursement therefrom, shall be kept and be open to public inspection during all reasonable hours. Acts 1929, p. 311, § 5.

§ 1519(55f). Act not repeal benefits now being paid.—This Act shall not repeal or in any wise affect any pensions or benefits or aids now being paid to those who may come under the operation of this Act. Acts 1929, p. 311, § 7.

§ 1519(55g). Act not affect workmen's compensation laws, etc.—This Act shall not affect or be affected by any workmen's compensation law or similar laws. Acts 1929, p. 311, § 8.

§ 1519(55h). Pensions for certain infirm or disabled officers or employees of counties of more than 200,000 population.—In all counties of this State having a population of over two hundred thousand inhabitants according to the United States census of 1920, or any future census, the commissioners of roads and revenues, or the ordinary, or other county authorities having charge of the levying of taxes in such counties, shall have the right to provide and pay pensions to infirm or disabled county employees and officers, including county police, but not officers elected by the people, or their deputies or assistants; said pensions to be payable monthly in such sums as said county authorities in their discretion may determine, provided however no pension may exceed monthly fifty per cent. (50%) of the average monthly earnings for the preceding ten years paid by the county to said employees or officer while in the employ of the county; or if the said officer or employee shall have been in the employ of the county for less than ten years, then the monthly pension shall not exceed fifty per cent. of the average monthly earnings during the period of said employment. Said county authorities shall have the right to prescribe the rules, regulations, and conditions under which said pension shall be paid. Acts 1929, p. 314, § 1.

§ 1519(55i). Pensions for employees not infirm or disabled, after 25 years' service.—A pension may be granted to such an employee or officer who is not infirm or disabled, if such officer or employee has been in the county employment for at least twenty-five years and because of age or for other cause may wish, or said county authorities may desire, to retire from the county employment. Acts 1929, p. 315, § 2.

§ 1519(55j). Taxes to pay pensions.—Said county authorities shall have the right to levy taxes, in addition to other taxes authorized by law, for the purpose of carrying out the terms and purposes of this Act. Acts 1929, p. 315, § 3.

§ 1519(55k). When effective.—This Act shall take effect immediately upon its passage and approval by the Governor or upon its becoming a law without such approval; provided, however, that should this Act be held illegal or unconstitutional, then this Act shall take effect when an

amendment to the Constitution of Georgia shall be adopted and proclaimed by the Governor of the State as a part of the Constitution, authorizing the legislature of the State to empower counties to levy taxes to pay pensions to county officers and employees. Acts 1929, p. 315, § 4.

PENSIONS FOR MUNICIPAL EMPLOYEES

§ 1519(56). City employees in cities of above 150,000 people.—There shall be raised and established funds for the pension of all officers and employees now in active service and on the pay-rolls, and future officers and employees in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920, or any subsequent census of the United States. Acts 1927, p. 265.

§ 1519(57). Right to retire after 25 years service.—Every regular officer and employee of such city, in active service at the time of the passage of this Act, now on the pay-roll, and future officers and employees, may as a matter of right retire from active service, provided he shall have served twenty-five (25) years in active service of such city at the time of his retirement.

§ 1519(58). Half-pay.—When such officer or employee shall retire as a matter of right, he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly.

§ 1519(59). Board of trustees for fund; members.—There is hereby established a board of trustees, to serve without pay, whose duty it shall be to see that the provisions of this Act are carried out by such cities; that the funds are kept separate; each of such cities shall have a board of trustees composed of the mayor, city comptroller, and city treasurer, or such officials who discharge duties usually assigned said officers. This board shall make rules describing forms for applicants for said pensions, and all other matters connected with their duties under this Act. When a pension is awarded by said board, the award shall be transmitted to the governing authorities of said city, who shall provide some manner for verifying the facts of the petition, or other legal requirements; when so verified, a check shall be drawn on the fund provided for the payment of the pension each month during the life of the pension, signed by the mayor and paid by the treasurer with the notation on each check that the pension has been approved by the governing authority of such city. Said board shall designate times and place of meeting, method of hearing and decisions, etc.

§ 1519(60). Deduction of 2 per cent. from salaries.—The sum of two per centum shall be deducted from the salaries or wages of all officers and employees of such cities as and when paid. This sum shall be retained by the city treasurer, and is hereby set apart as a pension fund free

from the control of such cities for any other purpose of expenditure.

§ 1519(61). Appropriation to meet deficiency in fund.—When pensions are properly allowed and become a charge on such cities, and the fund derived from the deductions from the salaries and wages is not sufficient to meet such pensions, the governing authorities of such cities shall provide, by appropriation from the current funds thereof, a sufficient sum to meet said pensions as they fall due.

§ 1519(62). Objectors to deduction excluded.—In case any employee or officers objects to the deduction of said salary or wages of said two per cent, or otherwise objects to the payment of said two per centum, such officer or employee shall not be entitled to the pension provided by this Act.

§ 1519(63). Supplementary ordinances.—The governing authorities of such cities shall be authorized to pass ordinances supplementing the provisions of this Act where its terms are found not to be full enough to provide for the collection and payment of such payment.

§ 1519(64). Funds not assignable or subject to garnishment etc.—None of the funds herein provided for shall be subject to attachment, garnishment, or judgment, nor shall they be assigned, but shall be paid to the pensioner only or on his order.

§ 1519(65). Effect as to pensioner under previous law.—This Act does not repeal nor in anywise affect any benefit or pension now being paid under some previous ordinance or Act, but no pensioner shall receive two pensions. Those already receiving pensions are not eligible to pensions under this Act.

§ 1519(66). Workmen's compensation law not affect d.—This Act shall not affect nor be affected by any workmen's compensation law or similar laws.

PENSIONS FOR MUNICIPAL OFFICERS

§ 1519(67). City officers in cities of above 150,000 people.—All cities in Georgia having a population of more than 150,000 inhabitants by the United States census of 1920, or any subsequent census of the United States, shall provide pensions for the following heads of departments of their assistants or subordinates, to wit: city clerk and chief deputy; city attorney and assistant and investigator; comptroller, assistant and auditor; purchasing agent; treasurer and tax-collector; tax-assessors, their tax investigator and their chief clerk; marshal; building inspector; recorders; health officer; superintendent of Grady and Battle Hill sanatoriums; chief of construction, assistants in charge of sewers, streets, sidewalks, repairs, plumbing, and bridges; chief sanitary in-

spector and assistant; street-improvement collector; superintendent of electrical affairs; warden; superintendent of public schools; librarian; general manager of parks and cemeteries; general manager of waterworks, together with superintendent of construction and two chief engineers in the waterworks department. If said cities have no officials or employees having these particular titles then the officials or employees discharging the duties nearest to those indicated shall receive the pension herein provided. Provided, the officers named are in active service in their several offices and positions at the time of the passage of this Act, and their names are on the pay-roll, and likewise for their successors in office or in said positions, provided they have served twenty-five (25) years in the active service of said city at the time of their retirement. In counting this period of service, any official who was serving in a municipality annexed to said city, shall have computed the time of service rendered in the annexed municipality in making up said twenty-five (25) years. Acts 1927, p. 269.

§ 1519(68). Right to retire on half-pay.—Said officers and employees shall be and they are hereby authorized to retire as a matter of right, when they shall have passed or attained the required years of service, and in such event they shall be paid one half of the salary they are receiving at the time of such retirement, for the rest of their lives, to be paid monthly.

§ 1519(69). Committee in charge of pensions.—It shall be the duty of the governing authorities of said cities to provide that some standing committee shall have charge of these pensions. Said committee shall formulate the rules under which applications therefor shall be made, and provide for the method by which said pensions may be set up, ordered and established. When so ordered and established, they shall report to the governing authorities and to the comptroller, and same shall thereafter become a fixed and binding obligation on the part of the city. When so found and reported, the city, through its governing authorities shall provide for the payment thereof from fund herein provided and its current funds, and these payments shall be kept up during the lives of said pensioners and funds shall be annually provided sufficient to cover the payment of said pensions, and same shall be promptly paid to said pensioners monthly, and shall be one half of the sum received at the time of their retirement.

§ 1519(70). Supplementary ordinances.—Such cities shall by their governing bodies be authorized to pass ordinances carrying into effect the purposes of this Act, but not in violation of the terms thereof. This is done in order to provide for rules and regulations, so that the provisions of this Act may be carried out and become effective, although its terms may not be sufficiently specific to secure the results desired.

§ 1519(71). Pensions only for those paying 2 per cent. of salary to fund.—The fund with which to pay the pensions herein provided for shall be

set up as follows: Each of said officials may pay into a fund established and set apart by ordinance the sum of (2) two per cent. of their salaries monthly. Should said fund, at any time, be insufficient to meet and pay said pensions, such cities shall supplement, by appropriation from current funds, sufficient amounts to make up the difference. In case any of said officials fail to pay said per centum, they shall thereupon become ineligible to receive pensions. These matters shall be regulated by ordinance.

§ 1519(72). Not affected by workmen's com-

pensation law.—This Act shall not affect nor be affected by any workmen's compensation laws; nor any similar laws; nor shall any pensioner be paid more than one pension, if there are other regulations by general law or charter amendment under which the pensioner may be paid another and different pension.

§ 1519(73). **Meaning of "governing authorities."**—The words "governing authorities," herein used, mean either general council or council or commission or other officials in charge of the affairs of said city.

APPENDIX I

EXTRA SESSION OF 1926 AS AMENDED

NON-AMENDATORY ACTS.

§ 1. (a) **State agricultural and normal college established.** — There shall be established, at Americus, Georgia, on the tract of land occupied by the Third District Agricultural and Mechanical School, as a branch of the University of Georgia, a Normal School for teachers to be known as the State Agricultural and Normal College, to which shall be admitted white students, citizens of this State, both male and female, and without charge for tuition therein. Acts 1926, p. 34.

(b) **Control and use of property.**—The plant, equipment, and property, both real and personal, of said Third District Agricultural and Mechanical School, title to which is in the State of Georgia, shall be for the use of said State Agricultural and Normal College; and the Trustees of said Third District Agricultural and Mechanical School, for their respective terms, unless removed as hereinafter specified, shall have as full and complete authority for the management and control of said College as they now have over said Third District Agricultural and Mechanical School. Acts 1926, pp. 34, 35.

(c) **Trustees; apportionment and terms; membership.**—The local Board of Trustees of said State Agricultural and Normal College shall be composed of nine members, three of whom shall be appointed by the Chairman of the Board of Trustees of the University of Georgia. The other members of said local Board of Trustees shall be appointed by the Governor of this State. Three shall be citizens of the County of Sumter, and three shall be citizens of this State residing outside of the County of Sumter. At the first appointment of such trustees two shall be appointed by the Governor for a term of two years, two for a term of four years, and two for a term of six years; but all subsequent appointments shall be for a term of six years, except in case of a vacancy by reason of death, resignation, or otherwise, when the Governor shall fill such vacancy by appointment for the unexpired term. The members of the Board of Trustees for the Third District Agricultural and Mechanical School, in office at the time of the passage and approval of this Act, shall also be members of the Board of Trustees of the State Agricultural and Normal College hereby created and established, until the expiration of their respective terms of office. When the terms of office of all of said District School Trustees shall expire, the members of the Board of Trustees of said College shall be nine in number as hereinbefore provided. But nothing in the provisions of this Act shall deprive the Governor of the right to appoint any member of the Board of Trustees of said School a member of the Board of Trustees of said State Agricultural and Normal College under the provisions of this

Act prior to the expiration of the term of office of such person as a Trustee of the said Third District Agricultural and Mechanical School. Acts 1926, pp. 34, 35.

(d) **Vacancies.**—Whenever it is made to appear to the Governor that any member of the Board of Trustees of said College has failed to attend two successive meetings of the said Board of trustees without rendering an excuse in writing which is satisfactory and accepted by the Board, it shall be the duty of the Governor to declare his place vacant, and to fill the same in the manner hereinbefore provided for filling vacancies. Acts 1926, pp. 34, 36.

(e) **Expenses.**—The members of the Board of Trustees of said College shall serve without pay, except that their actual expenses, while away from their places of residence attending on the meetings of the Board, shall be paid out of any fund in the treasury of said College available for such purpose. Acts 1926, pp. 34, 36.

(f) **Course of study.**—Said Trustees shall cause to be maintained in said College courses of study in general agriculture, home economics, and other subjects in connection therewith, and in addition shall require to be taught therein and added thereto at least two years of normal training for teachers similar to that taught in other colleges of like character; provided, however, said Trustees shall have ample authority by proper rules and regulations to provide for an election of courses of study in said College. Acts 1926, pp. 34, 36.

(g) **Supervision by Chancellor.**—The Chancellor of the University of Georgia shall have supervision of the said State Agricultural and Normal College, and its management and operation as a Department of the University of Georgia. All diplomas and certificates issued by said College shall be countersigned by said Chancellor, who shall cause a record of same to be kept in his office at Athens. Acts 1926, pp. 34, 37.

(h) **Officers and teachers.**—Said Trustees shall have authority to create such officers of said college, and employ such teachers, and fix salaries of same, as may be necessary to carry out the purpose of said College herein set forth. Acts 1926, pp. 34, 37.

(i) **Diplomas and certificates.**—Said College shall have authority to give diplomas, certificates, and such other evidence of work done as may be authorized by law or conferred and given by other College of like character and standing. Acts 1926, pp. 34, 37.

(j) **Instruction; teachers training school.** — Nothing herein contained shall be construed as reducing the authority of the Trustees of said College to provide for full instructions in the branches of study hereto before and now pre-

scribed for the students in said School, it being the intention of this Act to enlarge the scope and increase the usefulness of said School by maintaining in connection therewith and as a part of same a teachers training school for the State of Georgia. Acts 1926, pp. 34, 37.

(k) Appropriations to Third District A. & M. School.—All appropriations made to the Third District Agricultural and Mechanical School shall be for the use of said State Agricultural and Normal College, as herein consolidated therewith. Acts 1926, pp. 34, 37.

§ 2. (a) Authority to borrow of local boards of trustees.—The boards of trustees of any local school district levying a local school tax shall have authority to borrow money in amounts not to exceed the local tax collected on property within the district during any current year, said fund or funds borrowed to be used only for purpose of paying teachers for the current year, and not for a longer period than twelve months. Acts 1926, p. 38.

(b) Resolution; contents; record.—In order for any board of trustees of any local school district to borrow money for the purpose hereinbefore stated, there shall be passed by said board of trustees a resolution authorizing said money to be borrowed, in which resolution shall be stated the amount of money to be borrowed, the length of time the same is to be used, the rate of interest to be paid, and for what purpose borrowed, and from whom the same is to be borrowed; which resolution shall be by the Secretary of said board of trustees recorded in the minute-book of said board of trustees, and a copy of said resolution forwarded to the county superintendent of schools. Acts 1926, p. 38.

(c) Period of time; repayment. — No money shall be borrowed for a longer time than is necessary, and the same shall be paid back out of any funds coming into the hands of said board of trustees from local district tax collected on property within said district. Acts 1926, pp. 38, 39.

(d) Power to execute; notes for money.—After the resolution aforesaid has been passed, the chairman of said board of trustees together with the secretary, shall have the right to execute the note, or notes, in the name of said board of trustees of said local school district for any money that it is authorized to borrow under the resolution passed by said board. Acts 1926, pp. 38, 39.

§ 3. Equalization of common school fund; counties to which applicable.—In addition to the regular appropriation for the support of the public schools, the General Assembly shall provide an equalization fund, which shall be disbursed by the State Board of Education for the purpose of more nearly equalizing the educational opportunities of the children of the several counties of the State. The State Board of Education, in its distribution of said equalization fund to County Boards of Education for the purpose of equalizing educational opportunities as between the several counties, shall take into consideration the possible returns from taxable values for school purposes, the extent to which local tax aid has

been utilized, the educational needs, and the local inequalities existing in the several counties. No county or independent system shall share in the equalization fund for any year unless it levies at least five mills for a local tax for its public school for that year. Acts 1926, p. 39.

§ 4. (a) Merger of independent school systems; procedure.—Whenever the citizens of municipality of independent school districts authorized by law to establish and maintain a system of schools by local taxation, in whole or in part, and which is operating a system of public schools independent of the county-school system, wish to annul their special school law and become a part of the county-school system, they shall present and file with the Mayor or chief executive officer of the city a petition signed by one fourth of the qualified voters of their territory, and said Mayor or chief executive officer shall then within not less than twenty days and not more than sixty days thereafter call an election. Notice of such an election shall be published once a week for two weeks in the paper in which the sheriff of the county publishes his advertisements, and posted at three public places within the territory concerned, at least ten days prior to such election. The election shall be held at the place and in the manner of usual elections. Those favoring the repeal of the independent local law shall have written or printed on their ballots "For Repeal," and those against repealing their independent local law shall have written or printed on their ballots "Against Repeal." The returns of said election shall be made to the Mayor or chief executive officer, who shall declare the result, and a majority of those voting shall be necessary to carry the election. Only qualified voters residing within the municipality or district for six months prior to the election shall vote. An election shall not be held for the same purpose oftener than every twelve months. Acts 1926, p. 40.

(b) School operations.—When the results of said election are declared and published in favor of repealing such independent or local school system, making the territory included in said system thereby to become a part of the county-school system, said independent or local school system shall continue to function under its local laws, organizations, and regulations until the county board of education shall arrange for the operation by them of such school or schools within said local system as a part of their public-school system. Acts 1926, pp. 40, 41.

§ 4(c). Merger; tax rate; counties excluded.—Where any local or independent system is repealed by and in the manner provided in this act, the territory formerly included in such independent system shall become and constitute a school district of the county in which it is located, and shall enjoy the same privileges and shall be governed by the same laws as other school districts in said county, including the authority to levy local taxes for school purposes; provided that the rate for such taxation shall not exceed the rate allowed by law to other similar school districts. Provided, that nothing herein contained shall apply to a municipal or independent local school

system of a municipality having a population of 200,000 or more, according to the last or any other United States Census. Acts 1926, pp. 40, 41; 1927, p. 160.

§ 5. School fiscal year.—"Beginning with July 1st, 1927, and continuing thereafter, the school year shall be from July 1st to the next June 30th inclusive of each year thereafter; and the State School Superintendent shall, on or before the 1st Tuesday in December of each year beginning in 1894, or as soon thereafter as practicable, make an estimate of the entire common school fund for the State for the next succeeding calendar year." Acts 1926, Ex. Sess., pp. 42, 43.

§ 6 (a) Pension fees to ordinaries.—From and after the passage of this Act, including the year of 1926, each Ordinary of the State of Georgia shall be allowed a fee of two dollars per pensioner, per annum, for preparing all papers, proofs, and pay rolls and for securing, receiving, and paying out the Confederate pensions to the various pensioners in their respective Counties, which shall be in full settlement for all the services to be performed in connection with pension work and pension disbursements of their Counties. Acts 1926, p. 49.

(b) Payment, how made.—Said fee of two dollars per pensioner, per annum, shall be paid by the State of Georgia each year, out of the unexpended balance of the pension fund, by a warrant of the Governor, granted upon the requisition of the Commissioner of Pensions, to which requisition the Commissioner of Pensions shall attach a certified statement showing the amount due to the Ordinary of each county after all the Ordinaries of the State have made a full and complete settlement of their pension rolls for the year, such warrants to be drawn against the unexpended balance of the pension fund remaining in the Treasury after all the pensioners have been paid for the current year. Acts 1926, Ex. Sess., pp. 49, 50.

(c) Warrants; appropriation not necessary.—The Governor is hereby directed and empowered and it shall be his duty, to draw such warrants once each year on the unexpended balance of the pension fund remaining in the Treasury after all the pensions for the year have been paid, and that no appropriation or other provision shall ever be necessary to authorize the drawing of such warrant each year and the paying of the same. Acts 1926, Ex. Sess., pp. 49, 50.

(d) Payments to counties.—The sums herein provided for to be paid to the Ordinaries of the respective Counties shall be paid to the proper authorities handling the County funds in those Counties in which the Ordinaries draw a fixed salary. Acts 1926, Ex. Sess., pp. 49, 50.

§ 7 (a) Discount by Governor.—The governor of the State is hereby authorized, fully empowered, and directed to set apart, sell, and discount not exceeding eight years of the rental arising from the existing lease of the Western and Atlantic Railroad, as a special fund to be used exclusively for the purpose of paying war-

rants drawn against the same in accordance with the provisions of this Act. Acts Extra Sess., pp. 51, 52; Acts 1926, Ex. Sess., pp. 52, 53.

§ 8 (b) In order to enable the State to meet its obligations due to Confederate Soldiers and their widows for pensions due and unpaid for the years 1922, 1924, and 1925, the Governor of this State is hereby authorized, fully empowered, and directed, to draw his warrant or warrants against the special fund created by Section 1 of this Act, so held as a special fund in the Treasury, for such sum or sums as may be required to pay said pensions for said years 1922, 1923, 1924, and 1925, and the Governor is further authorized, empowered, and directed, to discount said warrant or warrants so drawn against said special fund and to place the proceeds arising therefrom in the Treasury to be disbursed for the purpose provided in this Act, in accordance with existing laws for the payment of pensions. Said warrants shall be duly countersigned by the Comptroller General. The holders of said warrants shall further have all of the rights and privileges which the original obligees of said warrants have had against the State. Acts 1926, Ex. Sess., p. 51.

AMENDATORY OR REPEALING ACTS

§ 9. Repealing § 993(67)—Insurance agents.—Upon each local insurance agent doing business in this State, and upon each and every solicitor or sub-agent for any resident or non-resident company doing business in this State, \$10.00 for each county in which they shall transact or solicit insurance business. Acts 1926, Ex. Sess., pp. 18, 19.

§ 10. Repealing Sections 993(150) and 993 (153).—Each dealer shall pay said tax to the Commissioner of Revenue of the State of Georgia, who shall furnish to such dealer stamps of such design and denominations as may be prescribed by said Commissioner of Revenue; and it shall be the duty of each dealer to affix to each package of cigarettes and each box, package, or other container of cigars a stamp, or stamps, furnished by said commissioner of revenue, evidencing the payment of the tax imposed by this Act, and to cancel such stamps before said cigarettes or cigars are offered for sale. Acts 1926, Ex. Sess., pp. 12, 14.

§ 11. Amending § 1041(1).—It shall be the duty of the legal representative of the estate of any person who may hereafter die a resident of this State, and whose estate is subject to the payment of a Federal Estate tax, to file a duplicate of the return which he is required to make to the Federal authorities, for the purpose of having the estate taxes determined, with the State Tax Commissioner. When such duplicate is filed with the said official, he shall compute the amount that would be due upon said return as Federal Estate Taxes under the Act of Congress relating to the levy and collection of Federal Estate Taxes upon the property of said estate taxable in Georgia,

and assess against said estate as State inheritance taxes eighty per centum of the amount found to be due for Federal Estate Taxes. Acts 1926, Ex. Sess., pp. 15, 16.

§ 12. Amending § 1041(4).—Whenever the legal representative of any estate taxable under this Act fails to pay the amount assessed against said estate, within six months after notice from proper authority as to the amount to be paid, it shall be the duty of the Tax Collector of the County of the administration to issue execution for the amount of such tax against said estate, which execution shall be enforced by levy and sale, and shall bear interest at the rate of one per cent per month until paid. Acts 1926, pp. 15, 16.

§ 13. Amending § 1041(15).—There shall be no other inheritance tax assessed or collected out of estates of persons dying after the passage of this Act, under the laws of this State. Acts 1926, Ex. Sess., pp. 15, 17.

§ 14. Repealing § 1551(124).—Each and every lot or parcel of land which has been or may hereafter be obtained by any County Board of Education, Independent School District, or Consolidated School District for the use of the Common Schools, or Common High Schools, together with any buildings erected thereon for school purposes, and all school furniture, shall be exempt from levy and sale under any execution or other writ or order in the nature of an execution; provided, the lot of land so exempted shall not exceed ten acres; and if there be any excess over that number of acres, then that portion not to exceed ten acres most convenient for school purposes shall be exempt as aforesaid, the exempted portion to be set off by order of County Board of Education, or Boards of Trustees of Independent School Systems, or Consolidated School Districts. Acts 1926, Ex. Sess., pp. 17, 18.

§ 15. Amending § 2158(102).—(a) A service bureau is hereby created, to be known as the Veterans Service Office, State of Georgia, to be composed of one director, one assistant director, and the necessary stenographic and clerical help. Acts 1926, Ex. Sess., pp. 53, 54.

(b). **Amending § 2158(103).**—Section 2158 (103) of this code was amended by adding thereto the following words: Said director shall be appointed by the Governor and be chosen from ex-service [men] who were in the military or naval service of the United States during the period between April 17th, 1917, and November 11th, 1918, and honorably discharged therefrom. Said assistant director shall be appointed by the Governor on the recommendation of the director. The term of office of said director shall be for the first time after passage of this Act until December 31, 1927, and two years thereafter. The term of office of Assistant Director shall continue for a period of two years only, at the end of which time said office of Assistant Director is then abolished, except the Assistant Director may be sooner discharged by the Director if in his opinion an assistant is no longer needed or the As-

sistant is incompetent, but in no event shall the office of Assistant Director be continued for a longer period than 2 years. Acts 1926, Ex. Sess., pp. 53, 54.

(c). **Duties of Director.**—The duties of said director shall be to disseminate information to veterans of the War with Spain, the World War, and to veterans of any war, military occupation, or military expedition since 1897, their dependents and beneficiaries, as to their rights and benefits under Federal legislation or legislation of this or any other State heretofore or hereafter enacted; to assist said veterans, their dependents, and beneficiaries in the preparation and prosecution of claims before the appropriate governmental departments; to report all evidences of fraud, deceit, and unworthy claims coming or brought to his attention to the department concerned; to report all evidences of incompetency, dishonesty, and neglect of duty of and by any employees of any governmental department to the proper authority; and generally to do and perform all things possible for the interest and protection of the worthy veteran; and to co-operate with the Georgia Departments, The United Spanish War Veterans, The American Legion, the Disabled American Veterans of the World War, the American Red Cross, and all other agencies to these ends. Acts 1926, Ex. Sess., pp. 53, 55.

(d). **Amending § 2158(105).**—The salary of said director shall be twenty-six hundred dollars per annum, effective August 21, 1925, and the salary of said Assistant director shall be twenty-four hundred dollars per annum. Acts 1926, Ex. Sess., pp. 53, 56.

§ 16. Amending § 2202(1).—Every corporation having capital stock heretofore or hereafter incorporated under the laws of this State, whether by the Secretary of State, by Act of the General Assembly, or by the Superior Court (including corporations with powers derived from two or more of such sources), except an insurance, banking, or trust company, may, upon its organization or thereafter in the manner hereinafter provided, create shares of stock with or without par value, and may create two or more classes of stock with such preferences, voting powers, restrictions and qualifications thereof as shall be designated in its petition, declaration, or other application for incorporation, or be subsequently determined upon in the manner hereinafter provided: Provided, that before any corporation shall avail itself of the provisions of this Act it shall procure appropriate corporate authority therefor, in the manner provided by law, and the Secretary of State and the Superior courts are hereby authorized to grant such powers to the several classes of corporations of which they now have jurisdiction to grant or amend charters: Provided further, that there shall be but one class of common stock, each share of which shall stand upon an equality with every other share; Provided further, that before any such corporation can begin business as a corporation there must be at least \$1,000.00 paid in for such non-par value common stock either in cash or in tangible assets at their fairly appraised valuation. Acts 1926, Ex. Sess., p. 48.

§ 17. Amending § 2207(1).—All foreign corporations now doing business in the State of Georgia, or which may hereafter do business in the State of Georgia, and whose business is not against the public policy of this State, shall have the power to become domesticated in the manner hereinbefore pointed out; and upon becoming domesticated such corporations and the stockholders thereof shall have the same powers, privileges, and immunities as similar corporations created under the laws of the State of Georgia and the stockholders thereof have, subject to the same obligations, duties, liabilities, and disabilities as if originally created under the laws of Georgia, and shall no longer have that power of removing causes to the United States Courts which inheres in foreign corporations. Acts 1926, Ex. Sess., pp. 46, 47.

§ 18. Dissolution of domesticated corporations.—All foreign corporations thus domesticated shall be dissolved in the same manner and under same proceedings as are now provided for dissolution of domestic corporations. Acts 1926, pp. 44, 45.

§ 19. Amending § 3310(1). — Where advances

either of money or supplies or both are made for the purpose of planting, cultivating, making, or harvesting a crop or crops, the borrower or person to whom such money or supplies shall be furnished may secure the same by a bill of sale to secure debt under § 3306 of the Civil Code of 1910, covering the crop or crops to be grown by him within twelve months from the date of such bill of sale, although such crop or crops may not be planted or growing at the time of the execution of such bill of sale: Provided, that the crop or crops shall be described in said bill of sale with the same particularity as the laws of Georgia requires for a crop mortgage, and the amount of said advances in money or supplies be definitely stated and fixed therein. Such bill of sale shall pass title to the crop or crops covered thereby, and shall not be held or construed to be a mortgage: Provided, that the bill of sale herein authorized shall not be construed to be superior to the lien of a landlord for rent and supplies or to a laborer's lien, but shall be superior to a judgment of older date than such bill of sale, and to a mortgage or bill of sale not given to secure the payment of a debt created to aid in making and gathering the particular crop or crops covered by such bill of sale. Acts 1926, pp. 44, 45.

APPENDIX II

PROPOSED AMENDMENTS TO THE CONSTITUTION

§ 6462(2). Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that article 3, section 7, of the Constitution of Georgia be amended by adding thereto the following paragraph, to wit:

"Paragraph 26. The General Assembly of the State shall have authority to grant to the governing authorities of the Counties of Glynn and/or Fulton and/or Chatham and/or Bibb and/or Barrow and/or Colquitt authority to pass zoning and planning laws whereby such counties may be zoned or districted for various uses and other and different uses prohibited therein, to regulate the uses for which said zones or districts may be set apart, and to regulate the plans for development and improvement of real estate therein. The General Assembly is given general authority to authorize such counties to pass zoning and planning laws, and to levy and collect a tax therefor; and acts of the General Assembly heretofore passed, undertaking to grant such authority to such counties, are hereby ratified and confirmed." Acts 1929, p. 149, § 1.

§ 6521. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that article 7, section 6, paragraph 2, of the Constitution of Georgia be amended by adding thereto the following words, "To pay pensions to county officers and employees of Fulton County," so that said paragraph as amended, in addition to the purposes for which taxes may now be levied, shall authorize the General Assembly of the State of Georgia to delegate to Fulton County in this State the right to levy a tax to pay pensions to county officers and employees. Acts 1929, p. 134, § 1.

§ 6533. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that paragraph 1 of section 13 of article 6 of the Constitution be amended as follows:

(a) By striking from said paragraph the following: "and provided, further, that the Board of County Commissioners of the County of Richmond, or such other board or person as may from time to time exercise the administrative powers of said county, shall supplement from said county's treasury the salary of the Judge of the Superior Court of the Circuit of which the said County of Richmond is a part, by such sum as may be necessary, with salaries paid such Judge from the State Treasury, to make salary for said Judge of \$7,000.00 per annum; and such payments are declared to be a part of the court expenses of said county, and such payment shall be made to the Judge now in office, as well as to his successors. The provisions of this amendment shall take effect and the salaries herein

provided for shall begin from the ratification of this amendment, as provided in the second section thereof, and shall apply to the incumbent in office, as well as his successors."

(b) By adding in lieu thereof the following: "and provided further that the Board of County Commissioners of the County of Richmond, or such other board or person as may from time to time exercise the administrative powers of said county, shall supplement from said county's treasury the salary of the Judge of the Superior Courts of the Augusta Circuit by such sums as may be necessary, with salaries paid such Judge from the State Treasury, to make a salary for said Judge of ten thousand dollars per annum; and such payments are declared to be a part of the court expenses of said county, and such payment shall be made to the Judge now in office, as well as his successors. The provisions of this amendment shall take effect and the salaries herein provided for shall begin from the ratification of this amendment, as provided in the second section thereof, and shall apply to the incumbent in office, as well as his successors." Acts 1929, p. 118, § 1.

§ 6553. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that paragraph one (1), section two (2), article seven (7) of the Constitution of the State of Georgia be and the same is hereby amended by adding at the end of said paragraph the following language: "The General Assembly shall also have authority to levy taxes upon incomes for State purposes only, which tax may be graduated, the rate in no case to exceed five per cent., and to provide further for such exemptions as may appear to the General Assembly to be reasonable.

Sec. 1-A. The ad valorem tax for State purposes on all classes of property shall not exceed four mills for the first year an income tax is collected, and shall not exceed three mills for the second year an income tax is collected, and shall not exceed two mills for any subsequent year thereafter that an income tax is collected: except that the State's right to levy ad valorem tax for the purpose of paying the interest and principal of the present outstanding, recognized, valid and legal bonded indebtedness of the State shall not be hereby abridged.

Sec. 1-B. The State's right to tax persons and subjects of taxation in case of war, invasion, insurrection, and to defend the State in time of war, shall remain unlimited. Acts 1929, § 143, § 1.

§ 6554(2). Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that article seven (7), section two (2), paragraph two (2) and paragraph two-A (2-A) of the Constitution of the State of

Georgia be and the same is hereby amended by adding at the end of said paragraph two (2) another paragraph to be known as paragraph two-B (2-B), to wit:

Paragraph 2-B. Any person, natural or artificial, who after or within two years prior to the ratification of this amendment has built, or may build on the Chattahoochee River, any dam for storage or any power-dam for the manufacture, generation, sale, or distribution of hydro-electric current, embodying flood control and flood protection features for the City of West Point, Georgia, may as to such project be exempt from all county, school, and municipal taxes for the Counties of Troup and Heard for such period of time as that the amount of taxes so exempted would equal to and absorb such part of the cost of such project as is attributable to such flood control or flood protecting features, such cost attributable to flood control and flood protection to be determined by the records of the Federal Power Commission. Provided, that interest shall not be computed on the sum to be absorbed by tax exemption as herein provided. Acts 1929, p. 145, § 1.

§ 6563. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that article seven, section seven, paragraph one, of the Constitution of Georgia, which has heretofore been amended, shall be further amended by adding at the end thereof a new subparagraph in the following words to wit: And except that Washington County may, in addition to the debts hereinbefore allowed, make temporary loans between March 1st and December 1st in each year, to be paid out of taxes received by the county in that year; said loans to be evidenced by promissory notes signed by the chairman and clerk of the board having charge of the levying of taxes in said county, and previously authorized by resolution by a majority vote at a regular monthly meeting of such board entered on the minutes; the aggregate amount of said loans outstanding at any one time not exceed thirty per cent., of the total gross income of the county from taxes and other sources in the preceding year, and no new loans shall be made in one year until all loans made in the previous year have been paid in full. Acts 1929, p. 147, § 1.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, that paragraph 1 of section 7 of article 7 of the Constitution of this State, as now amended, is hereby amended by adding at the end of said paragraph the following: Except that the City of Cornelia, from time to time as necessary for the purpose of repairing, purchasing or constructing a waterworks system, including all necessary pipe-line, pumping-stations, reservoirs, or anything else that may be necessary for the building, constructing, or operating a waterworks system for the City of Cornelia, may incur a bonded indebtedness in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of two hundred fifty thousand (\$250,000.00) dollars, and such in-

debtedness not to be incurred except with the assent of two thirds of the qualified voters of said city at an election or elections to be held as may now or may hereafter be prescribed by law for the incurring of new debts by said City of Cornelia. The city authorities of the City of Cornelia shall set aside and designate each year all of the net revenue derived from the operation of its waterworks system when constructed under the provisions of this Act, for the purpose of paying the interest and retiring its bonded indebtedness incurred under this Act; so that said paragraph of the Constitution when amended shall read as follows:

Paragraph 1. The debt hereinafter incurred by any county, municipal corporation, or political division of this State, except as in this Constitution provided for, shall not exceed seven per centum of this assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for temporary loan or loans to supply casual deficiencies of revenue, not to exceed one fifth of one per centum of the annual value of taxable property therein, without the assent of two thirds of the qualified voters thereof at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this Constitution, may be authorized by law to increase, at any time, the amount of said debt three per centum upon such assessed valuation; except that the City of Augusta, from time to time, as necessary for the purpose of protection against flood, may incur a bonded indebtedness upon its power-producing canal and municipal waterworks, in addition to the debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding fifty per centum of the combined value of such properties to be fixed as may be prescribed by law, but said valuation not to exceed a figure five per cent. on which shall represent the net revenue per annum produced by the two such properties together at the time of said valuation, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of said city at an election or elections for that purpose to be held as may be now or may hereafter be prescribed by law for the incurring of new debts by said City Council of Augusta. Except that the City of West Point, from time to time as may be necessary for the purpose of protection against floods, may incur a bonded indebtedness in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of seven hundred and fifty thousand dollars, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of such city at an election or elections to be held as may now or hereafter be prescribed by law for the incurring of new debts by said City of West Point. Except that the City of LaGrange, from time to time as necessary for the purpose of repairing, purchasing, or constructing waterworks system, including all necessary pipe-line, pumping-stations, reservoirs, or anything else that may be necessary for the building,

or constructing or operating a waterworks system for the City of LaGrange, may incur a bonded indebtedness, in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of five hundred thousand (\$500,000.00) dollars, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of such city at an election or elections to be held as may be now or may hereafter be prescribed by law for the incurring of new debts by said City of LaGrange. Except that the City of Cornelia, from time to time as necessary for the purpose of repairing, purchasing, or constructing a waterworks system for the City of Cornelia, may incur a bonded indebtedness, in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of two hundred and fifty thousand dollars (\$250,000.00), and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of said city at an election or elections to be held as may now or hereafter be prescribed by law for the incurring of new debts by said City of Cornelia. The city authorities of the City of Cornelia shall set aside and designate each year all of the net revenue derived from the operation of its waterworks system, when constructed under the provisions of this Act, for the purpose of paying the interest and retiring its bonded indebtedness incurred under this Act. Acts 1929, p. 121, § 1.

Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of same, that paragraph one, section seven, article seven of the Constitution of this State as now amended is hereby amended by adding at the end of said paragraph the following: Except that the City of Elberton, Georgia, from time to time as may be necessary for the purpose of condemning, purchasing, or constructing and maintaining an electric system within or without the city limits including dams, reservoirs, electric lines, poles, steam plants, or anything else that may be necessary for the building, construction, or operating of an electric system by the City of Elberton, may incur a bonded debt, in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not to exceed the sum of two hundred thousand (\$200,000.00) dollars, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of said city at an election or elections to be held as may now or may hereafter be prescribed by law for the incurring of new debts by said City of Elberton; so that said paragraph of the Constitution when amended shall read as follows:

Paragraph 1. The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this Constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or local division shall incur any new debt, except for temporary loan or loans to supply casual deficiencies of revenue, not to exceed one

fifth of one per centum of the annual value of taxable property therein, without the assent of two thirds of the qualified voters thereof at an election for that purpose to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this Constitution, may be authorized by law to increase, at any time, the amount of said debt three per centum upon such assessed valuation; except that the City of Augusta, from time to time, as necessary for the purpose of protection against floods, may incur a bonded indebtedness upon its power-producing canal and municipal waterworks, in addition to the debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding fifty per centum of the combined values of such properties, the valuation of such properties to be fixed as may be prescribed by law, but said valuation not to exceed a figure five per cent. on which shall represent the net revenue per annum produced by the two such properties together at the time of said valuation, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of said city at an election or elections for that purpose to be held as may be now or may hereafter be prescribed by law for the incurring of new debts by the said City Council of Augusta. Except that the City of West Point, from time to time as may be necessary for the purpose of protection against floods, may incur a bonded indebtedness, in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of seven hundred and fifty thousand dollars, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of such city at an election or elections to be held as may now or hereafter be prescribed by law for the incurring of new debts by said City of West Point. Except that the City of LaGrange, from time to time as necessary for the purpose of repairing, purchasing, or constructing water-works system including all necessary pipe-lines, pumping-stations, reservoirs, or anything else that may be necessary for the building or construction or operating a waterworks system for the City of LaGrange, may incur a bonded indebtedness, in and in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of five hundred thousand (\$500,000.00) dollars, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of such city at an election or elections to be held as may be now or may hereafter be prescribed by law for the incurring of new debts of said City of LaGrange; except that the City of Elberton, Georgia, from time to time, may increase its bonded indebtedness, in addition to and separate from the amount of debt heretofore allowed under said paragraph, for the purpose of condemning, purchasing, repairing, building, and maintaining an electric system within or without the City of Elberton, Georgia, including dams, reservoirs, electric lines, poles, steam plants or anything

else that may be necessary for an electric system, may incur a bonded debt, in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not to exceed the sum of two hundred thousand (\$200,000.00) dollars, and such indebtedness not to be incurred except with the assent of two thirds of the qualified voters of said city at an election or elections to be held as may now or may hereafter be prescribed by law for the incurring of new debts by said City of Elberton, Georgia. Acts 1929, p. 126, § 1.

That paragraph 1 of section 7 of article 7 of the Constitution of Georgia, as heretofore amended, shall further be amended by changing the period at the end thereof to a semicolon, and by adding at the end of said paragraph the words, "except that the County of Stephens, for the purpose of owning, erecting, equipping, and operating a hospital for medical and surgical treatment, may incur a bonded indebtedness of sixty thousand (\$60,000.00) dollars, in addition to and separate from the amount of debt hereinbefore in this paragraph allowed to be incurred, and may levy taxes to retire the principal and interest of said bonds; said bonds to be issued under the general law providing for county bond issues." Acts 1929, p. 142, § 1.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that article 7, section 7, paragraph 1, of the Constitution of Georgia, which has heretofore been amended, shall be further amended by adding at the end thereof a new subparagraph in the following words, to wit: "And except that the City of Lakeland in Lanier County, Georgia, from time to time as necessary for the purpose of acquiring, holding, enjoying, receiving, possessing, retaining, managing, maintaining, operating, improving, extending, equipping, and otherwise handling and negotiating the Lakeland Railway and any extension or branch thereof, together with any other transportation property and all rolling-stock and terminal facilities connected therewith, either within or without the city of Lakeland, either within or without the County of Lanier, including all property and improvements of whatsoever nature both real and personal, or anything else that may be necessary for the maintaining, building, constructing, and operating transportation lines and facilities of any kind and character, whether rail, bus, or otherwise, may incur an indebtedness, either in the form of bonds, debentures, notes or other evidence of indebtedness, in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount the aggregate of which shall be determined by the Mayor and Council of the City of Lakeland, such indebtedness not to be incurred except with the assent of a two-thirds majority of the Mayor and Council of said City of Lakeland. Said City of Lakeland by and through its Mayor and Council shall have authority to issue said bonds, debentures, notes, or other evidences of indebtedness as it may see proper, either limiting the security therefor to the railroad or transportation property or any part thereof, or/and providing that the security therefor shall be the entire assets of said city or any part thereof. Said City

of Lakeland is authorized by its Mayor and Council to levy such tax as it may see proper for the purpose of retiring the indebtedness and carrying out the purposes provided for by this amendment. Said City of Lakeland shall have the authority to prescribe such rules and regulations as it may see proper for the operation of said Lakeland Railway and any other transportation property, and to enact such ordinances, rules, and regulations as it may see proper for the protection of said railway and/or other transportation property or any extension or branches thereof from paralleling or other competition either within or without the limits of said City of Lakeland or/and of the County of Lanier, for the purpose of protecting and for preserving said railroad and/or other transportation properties against loss, depreciation, deterioration, or other handicap. Said City of Lakeland shall have authority to sell, lease, hypothecate, consolidate, and otherwise handle said Lakeland Railway and/or any other transportation property owned by said city, or any part thereof, and to execute such contracts, deeds, leases, or other instruments of writings necessary or desirable for carrying out any of the authorities and rights delegated by this amendment. Said City of Lakeland is specifically authorized to create such railroad commission or committee as it may see proper, through its Mayor and Council, for the operating and otherwise handling of said Lakeland Railway and/or other transportation property owned by said city, and to prescribe such rules and regulations by ordinance or otherwise, and prescribe such qualifications as it may see proper with reference thereto. Said City of Lakeland is authorized to comply with such rules and regulations as it may see proper and execute such forms and other instruments as it may become necessary as will enable it to co-operate with the Georgia Public Service Commission or any other department of the State or National Government which it may determine desirable to co-operate with in carrying out the provisions of this amendment." Acts 1929, p. 130, § 1.

§ 6579. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that article 8, section 4, paragraph 1, of the Constitution of Georgia, as heretofore amended, shall be further amended by adding at the end thereof a new subparagraph in the following words, to wit: "Pierce County, Georgia, shall be authorized to levy a tax, for high-school purposes, of not to exceed twenty cents on one hundred dollars of all the taxable property in said county, in addition to all other taxes which it is now authorized by law to levy, upon approval of a majority of the qualified voters of said county voting at an election held for the purpose of passing upon such a tax. If and when this amendment shall be ratified, it shall be the duty of the Commissioner of Roads and Revenues of Pierce County to call a special election to pass upon said tax, which election shall be held in the same manner as other elections held in said county. Notice of said election shall be published by said commissioner, in the newspaper in which sheriff's advertisements in said county are published, once a week for four con-

secutive weeks before said election is held. The rate of taxation to be levied for high-school purposes shall be that recommended by the Board of Education of Pierce County, but not to exceed the limit herein specified. The returns of said election shall be made to the Ordinary of said county, and the result declared by him. If the first election held should be adverse to such a tax, it shall be the duty of the Commissioner of Roads and Revenues of said county to again submit to the voters of Pierce County the question of whether such tax shall be levied when he is requested so to do by the Board of Education of Pierce County; provided, elections shall not be held for this purpose within less than six months of each other. When a tax for high-school purposes is approved by the voters of Pierce County, it shall be the duty of the Commissioner of Roads and Revenues to include in his next regular annual levy of taxes such tax for high-school purposes as may be approved by the voters of said county, and annually thereafter when the regular county levy is made. All monies arising from said tax shall be turned over to the Board of Education of Pierce County, Georgia, for expenditures for high-school purposes only, and said board shall have the right to make such arrangements with the Blackshear High-School and other high-schools in the county for high-school work as it may deem advisable." Acts 1929, p. 139, § 1.

§ 6598a. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that section one (1) of article eleven (11) of the Constitution of

Georgia be amended by adding thereto the following paragraph, to wit:

Paragraph 6. The governing authorities of the County of Glynn and of the County of McIntosh shall have authority to establish and administer within the bounds of their respective counties districts for special sanitation, fire prevention, police protection, or building and improving roads, and, to carry out the purposes of such establishment, they shall have authority to levy taxes upon the taxable property in said respective districts, to issue bonds of such districts upon a vote of the qualified voters of such districts and under the rules of law governing the issuance of county bonds, and to levy assessments against and collect service charges from the property abutting upon or served by the utilities established or provided pursuant hereto. Provided, that districts in McIntosh County may issue bonds not exceeding 14% of the value of the taxable property therein. Acts 1929, p. 137, § 1.

§ 6598b. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that article 11, section 1, of the Constitution of the State of Georgia be amended by adding at the end of said section a new paragraph, as follows: "The Commissioners of Roads and Revenues of Fulton County shall have authority to establish and administer sewerage, water, and/or fire prevention systems; to establish and maintain parks; and to levy taxes or assessments on property therefor." Acts 1929, p. 136, § 1.

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